Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the individual members of the Los Angeles County Board of Supervisors are entitled to *absolute* immunity from liability under 42 U.S.C. § 1983 for their legislative actions implicating public policy issues in voting to expend monies from the County budget to indemnify individual Sheriff's deputies for punitive damage awards pursuant to state law?

2. Whether, in an action brought under § 1983, an inquiry into the subjective intent (i.e., good or bad faith) of the members of the Los Angeles County Board of Supervisors in voting to indemnify Sheriff's deputies for punitive damages is permissible under this Court's precedent for purposes of assessing *qualified* immunity?

LIST OF INTERESTED PARTIES

Petitioners herein Michael Antonovich, Yvonne Burke, Donald Knabe, Gloria Molina and Zev Yaroslavsky are the five elected members of the Los Angeles County Board of Supervisors, the legislative body of the County of Los Angeles. They are sued in their official and individual capacities and were appellants in the Court of Appeals.

Respondent herein Javier Rocha is the plaintiff in the district court and was the appellee in the Court of Appeals.

The County of Los Angeles and Leroy Baca are defendants in the district court and were appellants in the Court of Appeals. They are not parties to this petition.

Defendants Pete Schabarum and Deane Dana were dismissed by the district court on September 14, 2000 for failure to prosecute. They were not parties before the Court of Appeals and are not parties to this petition.

Defendant Deputy David Sameyah was not a party before the Court of Appeals and is not a party to this petition.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is an unpublished decision reported at 2002 WL 1008617 (9th Cir. 2002). App. at 1. That decision affirmed the United States District Court for the Central District of California's order denying the Petitioners' Motion to Dismiss. The district court's order is reported in *Rocha v. Baca*, 2000 WL 1909474 (C.D.Cal. 2000). App. at 2-18.

JURISDICTION

The district court denied Petitioners' Motion to Dismiss on November 14, 2000. App. at 2-18. Petitioners filed a timely Notice of Appeal on November 22, 2000. The Court of Appeals for the Ninth Circuit summarily affirmed the district court's ruling on May 15, 2002. App. at 1. Petitioners timely filed this petition. Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1983 provides, in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

Section 825(b) of the California Government Code provides, in pertinent part, that:

> ". . . a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of state government, finds all of the following:
>
> (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
>
> (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.

NATURE OF THE CASE AND PROCEDURAL HISTORY

I. Introduction

A. Absolute Immunity

The Circuit Courts of Appeals are split concerning the proper test to apply when a legislator seeks absolute

immunity from civil liability under 42 U.S.C. § 1983. In determining whether the action at issue is legislative (and therefore absolutely immune) or administrative (and therefore not afforded absolute immunity), the Ninth Circuit continues to apply the wrong standard. Under the Ninth Circuit's test, if the legislator's action applies only to a few individuals, rather than to society at large, the legislator is not entitled to absolute immunity. The problem with the "individual versus society" test is that it is contrary to this Court's precedent and defeats the very purpose of absolute immunity, which is to protect legislators from having to litigate over their legislative acts.

The appropriate test is to examine the legislative action at issue, in this case casting votes on matters of public policy (i.e., the "best interests of the public entity") and to ask whether that action is legislative in function. If it is, the legislators are absolutely immune from liability. The smooth running of local government requires that this immunity be applied so that elected legislators are not inhibited in their duties for fear of being sued and are not distracted from their official functions. The system provides its own checks and balances on legislators' actions by way of the ballot box or removal from office if they exceed their powers.

The Ninth Circuit continues to employ the "individual versus society" test even though it was rejected by this Court in *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966 (1998) (mayor and city councilmembers entitled to absolute immunity for voting for a fiscal matter because such action is integral to the legislative process). *See Trevino v. Gates*, 23 F.3d 1480, 1483 (9th Cir. 1994) (*"Trevino I"*) (applying the "individual versus society" test in 1994, before *Bogan*); *San Pedro Hotel Co. Inc. v. City of Los Angeles*, 159 F.3d 470, 476

(9th Cir. 1998) (recognizing *Bogan* but nevertheless, eight months after *Bogan*, still utilizing the "individual versus society" test for determining absolute immunity).

In separate lawsuits brought by plaintiff's counsel herein, these specific legislator defendants have been sued personally at least sixteen times on exactly the basis that is at issue here. Without intervention from this Court, the Ninth Circuit will continue to permit such litigation, including discovery, despite this Court's rulings to the contrary and despite the prohibition of absolute immunity.

B. Qualified Immunity

The Ninth Circuit's ruling below also improperly transforms the qualified immunity analysis from a purely objective inquiry into one in which the *subjective intention* of each legislator is at issue. This Court repeatedly has held, however, that the only permissible inquiry in determining qualified immunity is an *objective* one. This Court has emphasized further the importance of ruling on the issue of qualified immunity at the earliest opportunity.

The Ninth Circuit has disregarded this precedent, however, by subjecting legislators to litigation – and discovery – as to whether they acted in "good faith." The requested writ is needed to protect legislators individually – in their personal capacities – so they can perform their legislative functions without having to respond to discovery and defend themselves in litigation that impermissibly inquires into their subjective intentions and motivations in legislating fiscal and public policy.

II. California Government Code section 825(b).

Pursuant to California Government Code section 825(b), the Petitioners are authorized to indemnify a county employee against a punitive damage award upon determining, "in [their] sole discretion," ~~that (i)~~ the employee was acting within the course and scope of his or her duties; (ii) the employee was acting in good faith and in what he or she perceived to be the County of Los Angeles' best interest; and (iii) payment of the punitive damages would be in the County's best interest.

In 1994, in *Trevino I*, the Ninth Circuit first considered the applicability of absolute immunity with respect to votes by municipal legislators to indemnify for punitive damages pursuant to section 825(b). There, the court held that absolute legislative immunity does not apply because such votes are "individually, not generally directed." *Trevino I*, 23 F.3d at 1483.

In 1996 in another case arising from the *Trevino* litigation, the Ninth Circuit considered the application of qualified immunity to a claim of liability based upon votes to indemnify for punitive damages. *Trevino v. Gates*, 99 F.3d 911, 916 (9th Cir. 1996) ("*Trevino II*"). In *Trevino II*, the Court found that qualified immunity applied because "the law was *not sufficiently clear* that a reasonable [public official] would understand that payment of punitive damages violates any constitutional right *either now or prior to the [incident in question].*" *Id.* at 917 (emphasis added).

In 2000, the Ninth Circuit decided another case regarding the application of qualified immunity to a claim based upon votes to indemnify for punitive damages. *Cunningham v. Gates*, 229 F.3d 1271, 1293 (9th Cir. 2000).

After recognizing that the law in the area was not clearly established until *Trevino II*, the *Cunningham* court observed that "[a]s a matter of chronological necessity," votes to indemnify punitive damage awards before *Trevino II* were automatically protected by qualified immunity. *Id.* at 1293. The Ninth Circuit held that votes which took place between *Trevino II* and the incident in question would be protected by qualified immunity as long as they were made in "good faith." *Id.* at 1293. The court concluded that the plaintiff failed to meet his burden of establishing that the votes were in "bad faith." *Id.* at 1293.

In 2001, the Ninth Circuit addressed the issue of qualified immunity in the context of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Navarro v. Block*, 250 F.3d 729, 734 (9th Cir. 2001). After reviewing *Trevino I*, *Trevino II* and *Cunningham*, the Ninth Circuit in *Navarro* reaffirmed that "local legislators are not entitled to qualified immunity if they implement their state-created power to indemnify police officers from punitive damage awards in bad faith." *Id.* at 734. The *Navarro* Court further stated that a § 1983 plaintiff is entitled to conduct discovery to determine whether punitive damage votes are made in "good faith." *Id.* at 734.

Besides the instant case, plaintiff's counsel has filed at least 29 other cases against local legislators (city and county) based upon this exact same claim.[1] While most of

[1] Petitioners and others have been sued in numerous cases which involved extensive discovery including multiple sets of interrogatories, notices of deposition, document requests, and motion practice regarding

(Continued on following page)

these cases ultimately have been dismissed, it has not been without substantial expense, delay, discovery and distraction from the performance of public duties.

For example, in *Moore v. Baca*, C.D. Cal. Case No. 01-CV-03552 FMC, the Petitioners moved in their individual capacities for summary judgment based on qualified and

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such discovery. *See Casares v. Baca*, 99-CV-07817 (Petitioners dismissed on February 25, 2002 on basis of qualified immunity); *King v. Baca*, 00-CV-11178 (Petitioners dismissed on February 4, 2002 on basis of qualified immunity); *Moore v. Baca*, 01-CV-03552 (Petitioners dismissed on May 21, 2002 on basis of qualified immunity); *Moreno v. Baca*, 00-CV-07149 (Petitioners dismissed on March 18, 2002 on basis of qualified immunity); *Bell v. Baca*, 01-CV-02067 (Petitioners dismissed on February 26, 2002); *Berry v. Baca*, 01-CV-02069 (Petitioners dismissed on February 26, 2002); *Hart v. Baca*, 01-CV-01866 (Petitioners dismissed on February 26, 2002); *Mortimer v. Baca*, 00-CV-13002 (Petitioners dismissed on February 26, 2002); *Hawkins v. Baca*, 00-CV-01078 (settled October of 2001); *R. Navarro v. Baca*, 98-CV-7434 (settled September of 2001); *L. Navarro v. Baca*, 99-CV-08888 (settled September of 2001); *Benas v. Baca*, 00-CV-11507 (currently pending); *Chweya v. Baca*, 00-CV-07150 (currently pending); *Thomas v. Baca*, 01-CV-10903 (Petitioners have yet to be served); *Green v. Baca*, 02-CV-04744 (Petitioners have yet to be served); and *Harris v. Baca*, 01-CV-10905 (Petitioners have yet to be served). Additionally, the members of the Los Angeles City Council have been sued under this theory of liability in several cases as well. *See Figueroa v. Gates*, 00-CV-4158 (City Councilmembers dismissed on June 11, 2002 on basis of qualified immunity); *Hernandez v. Gates*, 99-CV-11696 (City Councilmembers dismissed on June 20, 2000 on basis of qualified immunity); *Minster v. Gates*, 01-CV-01867 (case dismissed in its entirety June 28, 2002); *Lee v. Gates*, 01-CV-03085 (case dismissed in its entirety June 28, 2002); *Walker v. Gates*, 01-CV-10904 (currently pending); *Blumberg v. Gates*, 00-CV-5607 (currently pending); *Rivas v. Gates*, 00-07207 (currently pending); *Quintana v. Gates*, 00-CV-07167 (currently pending); *Rodriguez v. Gates*, 00-CV-07427 (currently pending); *Guerrero v. Gates*, 00-CV-07165 (currently pending); *Moss v. Gates*, 00-CV-07164 (currently pending); *Bell v. Gates*, 01-CV-01863 (currently pending); and *Berry v. Gates*, 01-CV-2066 (currently pending).

absolute immunity on August 20, 2001. Plaintiffs obtained two Rule 56(f) continuances to conduct more discovery. It was not until May 21, 2002 – nine months later – that the Petitioners were dismissed. *Moore v. Baca*, 2002 WL 1040997, *3-*4 (C.D.Cal. 2002). During that time, they were served with five sets of interrogatories, five sets of document requests, and at least three discovery motions; and their depositions were sought and avoided only after obtaining a protective order.

III. The Underlying Claims.

This petition for *writ of certiorari* arises from the allegations of Respondent/Plaintiff Javier Rocha that on March 17, 1999, Los Angeles County Sheriff's Deputy David Sameyah used excessive force during a search at a Los Angeles County jail facility. App. at 25. The Respondent seeks to impose personal liability pursuant to 42 U.S.C. section 1983 against Petitioners/Defendants Michael Antonovich, Yvonne Burke, Donald Knabe, Gloria Molina and Zev Yaroslavsky, who comprise the elected legislative body of Los Angeles County, namely its Board of Supervisors. App. at 22. The Respondent's theory is that because these individuals previously voted to indemnify other Sheriff's deputies for punitive damages pursuant to California Government Code section 825(b), the Petitioners encouraged the Sheriff's deputy herein to use excessive force against the Respondent, thereby causing the deprivation of his constitutional rights. App. at 24.

When the Respondent first filed this suit against the Petitioners, they moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds of absolute

and qualified immunity. App. at 2-3. On November 14, 2000, the District Court denied absolute immunity on the basis of *Trevino I* and denied qualified immunity pending further discovery, holding that "if plaintiff fails to come up with evidence of bad faith . . . on the part of the supervisors, that will be sufficient to entitle [the supervisors] to summary judgment." App. at 14. The Petitioners appealed that decision. On May 15, 2002, the Ninth Circuit summarily affirmed the district court's ruling in this case, relying on *Navarro*. App. at 1.[2]

IV. The Ninth Circuit's Affirmance Conflicts With This Court's Precedent.

This petition concerns the important concepts of absolute and qualified immunity for elected legislators. The policy reasons behind these doctrines, which are not defenses but *immunities from suit*, are to protect public officials, and society as a whole, from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S.Ct. 2727 (1982). *See Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034 (1987) ("permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties").

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[2] On June 12, 2002, after a bifurcated trial of the underlying claim, a jury concluded that the Deputy, in fact, used excessive force. This finding does not affect the argument or analysis herein.

These immunity doctrines are also designed to protect public officials from the burdens of pre-trial litigation and discovery, burdens which are "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817. Thus, public officials are entitled to an adjudication of absolute or qualified immunity "at the earliest possible stage in litigation." *Id.* at 817. By summarily affirming the district court's denial of absolute and qualified immunity, and deferring the adjudication of the Petitioners' defense of qualified immunity until after discovery regarding "good faith," the Ninth Circuit has eviscerated the fundamental purpose of public official immunity. As a result, the Petitioners will suffer the very injury that immunity is supposed to prevent.

THE REASONS FOR GRANTING THIS PETITION

I. Introduction

The Ninth Circuit's summary disposition affirming the district court's denial of absolute immunity is necessarily based upon *Trevino I*, which held that absolute immunity does not apply to punitive damage indemnification votes because such votes are directed at specific individuals rather than society at large. 23 F.3d at 1483. This "individual versus society" approach, however, was rejected by this Court in *Bogan v. Scott-Harris*, which was decided four years *after Trevino I*. 523 U.S. 44.

Despite and *after Bogan*, the Ninth Circuit continues to employ the wrong analysis with respect to absolute immunity:

> "In this circuit, we determine whether an act is legislative by considering two questions: (1) whether the act involves 'ad hoc decisionmaking,

> or the formulation of policy;' and (2) *whether the act applies 'to a few individuals, or to the public at large.'*"

San Pedro Hotel, 159 F.3d at 476 (emphasis added).

The Ninth Circuit likewise improperly continues to inject a subjective element to the qualified immunity analysis, in contravention of *Harlow*, 457 U.S. at 815 (qualified immunity analysis is an *objective* test and the subjective intent of the public officials is irrelevant), and a multitude of subsequent Supreme Court decisions. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806 (1985) (same); *Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S.Ct. 834 (1996) (same). Absent the relief sought here, this misstatement and misuse of the law will also continue unabated.

II. Argument

A. Absolute Immunity

The issue addressed by the Ninth Circuit in *Trevino I* was whether voting to indemnify officers for punitive damages awards constitutes a legislative act (for which absolute immunity would apply), or an administrative or executive act (for which there would be no absolute legislative immunity). This is an issue analyzed and decided wrongly not only in the Ninth Circuit, but by other Circuits as well.

In fact, there is a split among the Circuit Courts of Appeals as to what test should be used for determining whether an act is legislative, on the one hand, or administrative or executive, on the other hand. *Compare Ryan v. Burlington County, New Jersey*, 889 F.2d 1286, 1291 (3rd Cir. 1989) (acts directed at individuals, rather than the

society at large, are executive and not entitled to absolute immunity); *Haskell v. Washington Township*, 864 F.2d 1266, 1278 (6th Cir. 1988) (same); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (same); *Smith v. Lomax*, 45 F.3d 402, 406 (11th Cir. 1995) (same) *with*, *Acierno v. Cloutier*, 40 F.3d 597, 611 (3rd Cir. 1994) (rejecting the individual versus society test); *Carlos v. Santos*, 123 F.3d 61, 66 (2nd Cir. 1997) (whether an act is legislative or executive depends on the legislator's function in connection with that act); *Scott v. Greenville County*, 716 F.2d 1409, 1423 (4th Cir. 1983) (using the functional test to determine applicability of absolute immunity); *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (same); *Kamplain v. Curry County Board of Commissioners*, 159 F.3d 1248, 1251 (10th Cir. 1998) (same).

Trevino I held that the applicable test is to determine whether the action taken applies generally to society or whether it is directed to a few individuals; according to the Ninth Circuit, votes on punitive damage awards are not "legislative" and therefore are not entitled to absolute immunity. *Trevino I*, 23 F.3d at 1482-1483. In so holding, *Trevino I* relied on a First Circuit case, *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984), but this Court's decision in *Bogan* explicitly rejected the reasoning used in *Cutting*. *Compare Bogan*, 523 U.S. at 54-55, *with Trevino I*, 23 F.3d at 1482 (*citing Cutting*, 724 F.2d at 261) and *Scott-Harris v. City of Fall River (Bogan)*, 134 F.3d 427, 440-441 (1st Cir. 1997) (*citing, e.g., Cutting*, 724 F.2d at 261), *reversed*, 523 U.S. 44.

Four years after *Trevino I*, this Court decided *Bogan* and implicitly, if not explicitly, overruled *Trevino I*'s absolute immunity analysis. 523 U.S. at 54. This Court

rejected the "individual versus society" test as overly intrusive into the thinking and motivations of legislators. *Id.* at 55. The Court established that the test for absolute immunity is whether the legislator's actions were integral to the legislative process. *Id.* at 54-55. In *Bogan*, *how* the mayor and the city council acted, not *why* they acted, made the difference. *Id.* at 55. Despite *Bogan*, and six months after *Bogan* was decided, in 1999 in the *San Pedro* decision, the Ninth Circuit continued to misstate and misuse the *Trevino I* analysis. *San Pedro*, 159 F.3d at 476.

In *Bogan*, the city council approved, and the mayor signed, an ordinance which eliminated a local governmental health services department. *Id.* at 47. The plaintiff argued that because that department had only one person in it, the ordinance was one that was directed to an individual, rather than to the society at large, and therefore absolute immunity should not apply. *Id.* at 48. This Court rejected the "individual versus society" test the Ninth Circuit relied on in *Trevino I* and held, instead, that "whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* at 54.

The Court held that the mayor and a city councilmember were entitled to absolute immunity because the acts at issue, namely, proposing and voting on an ordinance, "were integral steps in the legislative process." *Id.* at 55. Moreover, the actions of the government reflected policymaking from the budgetary reasons for eliminating the plaintiff's position to the benefits and harm to society from eliminating the services the plaintiff provided. *Id.* at 47, 55-56. Recognizing the dangers to the governmental process in the event legislators became subject to lawsuits for the exercise of their legislative function, this Court noted that

there are other remedies in the event the public believes there is an improper use of the legislative powers. *Id.* at 52-53.

The absolute immunity test articulated by this Court, therefore, is whether the actions at issue are "integral steps" in the legislative process, a test the Ninth Circuit consistently has failed to apply and has ignored here. The legislative process is plainly invoked here. The Petitioners vote pursuant to a specific state statute (Cal. Gov't Code § 825(b)) authorizing them to make the alleged punitive damage indemnification votes in question here. By definition, that process is legislative. The inquiry should end there.

This Court's reasoning in *Bogan* further protects the process underlying the Petitioners' alleged votes here. The Petitioners act as legislators in deciding when to expend the resources of the County, in deciding if doing so would be in the "best interests of the County" (Cal. Gov't Code § 825(b)(3)), and in deciding when indemnity of an official acting in the "apparent best interests of the public entity" (Cal. Gov't Code § 825(b)(2)) would further the statutory purpose. Those determinations necessarily implicate the public and fiscal policy of the County.

The county's budget on a year-to-year basis is a finite amount; a decision to spend a portion of that budget to indemnify Sheriff's deputies necessarily means that those funds will not be available for another use in the county. Votes to indemnify also invoke public policy issues, *i.e.* "the best interests of the County." As in *Bogan*, these are "quintessentially legislative" functions.

The Ninth Circuit has failed to follow this Court's precedent, opting instead to follow and apply its own test

from *Trevino I*. Other Circuits also have failed to follow *Bogan*, *see, e.g.*, *Bryan v. City of Madison, Mississippi*, 213 F.3d 267, 273 (5th Cir. 2000). Thus, more than the Ninth Circuit's error is at stake here. This important issue needs to be addressed and clarified.

B. Qualified Immunity

In its trio of cases holding that qualified immunity rests on an analysis of the local legislator's "good" or "bad" faith in voting to indemnify punitive damage awards, *see Trevino II*, 99 F.3d at 918, *Cunningham*, 229 F.3d at 1292, and *Navarro*, 250 F.3d 734, the Ninth Circuit improperly injected a *subjective* element into the qualified immunity analysis. Inquiring into the subjective state of mind of an individual legislator tears away at this immunity to suit and threatens to impede the very function of government.

Qualified immunity is designed to protect governmental officials from the threat of litigation which would otherwise: (1) deter talented officials from entering public office; (2) discourage the vigorous exercise of official authority; and (3) distract government officials from performing their duties. *Richardson v. McKnight*, 521 U.S. 399, 407, 117 S.Ct. 2100 (1997) (internal citations and quotes omitted). *See Nevada v. Hicks*, 533 U.S. 353, 400, 121 S.Ct. 2304 (2001) (qualified immunity is designed to short circuit litigation for officials so that they are not subjected to the costs of trial or the burdens of discovery).

In 1982, this Court observed that the then-existing qualified immunity analysis contained two components – an "objective" aspect and a "subjective" one. *Harlow*, 457 U.S. at 815. Under the subjective component, "qualified immunity would be defeated if an official . . . 'took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury. . . .' [internal citations omitted]." *Id.* at 815 (emphasis in original). This subjective inquiry necessarily focused on the legislator's motive, intention and reasoning in taking the act in question, a premise that is "not consonant with our scheme of government." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783 (1951).

In *Harlow*, the Court rejected the subjective element as incompatible with the underlying purpose of qualified immunity. *Id.* at 815-16. The Court stated that because "an official's subjective good faith" is often considered a question of fact for the jury, the subjective element of the analysis makes it nearly impossible to prevent insubstantial claims from proceeding to trial, contrary to the purpose of qualified immunity in the first place. *Id.* at 816. An inquiry into a legislator's subjective intent, the Court reasoned, also requires "broad-ranging discovery" which is "peculiarly disruptive of effective government." *Id.* at 817. The Court in *Harlow* warned that "there is no clear end to the relevant evidence" of the intent of a legislator, including depositions of the legislator's "professional colleagues." *Id.* at 816-17.

These kinds of inquiries are grossly unfair to municipal legislators who would have to undergo depositions and discovery and have to stand trial on what they thought about, and what they were motivated by, when they voted. These inquiries conflict with the separation of powers

between the judicial and legislative branches and would result in undesired judicial inquiry into "why" a legislator enacted the law in question. As discussed in *Harlow*, inquiry into legislators' thought processes would harm the public interest and impair the legislative independence at the core of our representative government.

The Court in *Harlow* recognized and sought to avoid these consequences, by opting for an *objective* qualified immunity standard. The Court's objective test focuses on whether the challenged conduct violates "clearly established law" of which "a reasonable person would have known."[3] *Id.* at 818. The Court thus ensured that qualified immunity would serve the purpose for which it was designed – to protect public officials, and society as a whole, from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. *See Anderson*, 483 U.S. at 638 (qualified immunity protects government officials from "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"); *Mitchell*, 472 U.S. at 526 (same); *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584 (1998) (same).

[3] This decision brought the qualified immunity analysis in line with that of absolute immunity, which forbids consideration of the defendant official's subjective motivation. *See Tenney*, 341 U.S. at 377.

Affirming the lower court's decision here, the Ninth Circuit relied on its decision in *Navarro*, 250 F.3d at 733-734, which upheld the denial of a Rule 12(b)(6) motion to dismiss and held that discovery was permissible to inquire into the "good" or "bad" faith of municipal legislators. Thus, in *Navarro*, which was decided eight days after briefing in this case was completed, and in the instant case, the Ninth Circuit used a subjective rather than an objective test in deciding the issue of qualified immunity.

Navarro and the Court of Appeals' decision here require that district courts look into the minds of the Petitioners and not only determine what they were thinking at the time they made each alleged indemnification vote, but whether they voted with malice (i.e. "bad" faith). This inquiry requires legislators, once plaintiff pleads the appropriate "state of mind," to come forward with evidence to prove that they voted in "good faith," thus nullifying the protective purpose of qualified immunity. This analysis is the reincarnation of the subjective component rejected by this Court in *Harlow*. *See* 457 U.S. at 815-16.

The Ninth Circuit's continued use of a subjective standard contravenes nearly twenty years of this Court's jurisprudence: *Harlow*, 457 U.S. at 815 (qualified immunity analysis is based upon an objective analysis of the public officials' conduct); *Anderson*, 483 U.S. at 639 (applicability of qualified immunity "turns on the 'objective legal reasonableness' of the action"); *Behrens*, 516 U.S. at 306 (*Harlow* adopted an "objective legal reasonableness" test for qualified immunity, and in the process rejected a subjective "good faith" one); *Crawford-El*, 523 U.S. at 588 (defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the

defendant's subjective intent is simply irrelevant to that defense).

CONCLUSION

This Court often has emphasized the importance of absolute and qualified immunity to the efficient and effective operation of government and has articulated standards by which those doctrines are to be applied. The Ninth Circuit, however, has ignored the reasoning of these cases and, instead, has permitted lawsuits against local legislators involving expensive, time-consuming and distracting litigation and discovery.

It is vitally important that this Court reverse the aberrant decisions of the Ninth Circuit. For all the foregoing reasons, Petitioners respectfully pray that this Court grant the instant petition for *writ of certiorari* to prevent the erosion of these immunity doctrines. Petitioners further respectfully request such other and further relief as this Court deems just and proper.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAVIER ROCHA,

Plaintiff-Appellee,

v.

MICHAEL ANTONOVICH; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; LEE BACA; ZEV YAROSLAVSKY,

Defendants-Appellants,

and

PETE SCHABARUM; et al.,

Defendants.

No. 00-57059

D.C. No. CV-00-04989-AHM
Central California

ORDER

(Filed May 15, 2002)

Before: FERNANDEZ, WARDLAW, and W. FLETCHER, Circuit Judges

Because the questions raised in this appeal are so insubstantial as not to require further argument, *see United States v. Hooton,* 693 F.2d 857 (9th Cir. 1982) (per curiam), we grant appellee's motion for summary affirmance, *see Brewster v. Shasta County,* 275 F.3d 803 (9th Cir. 2001); *Navarro v. Block,* 250 F.3d 729 (9th Cir. 2001).

Accordingly, we summarily affirm the district court's judgment.

All pending motions are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER ROCHA, Plaintiff, v. LEE BACA, *et al.*, Defendant.	CASE NO. CV 00-4989 AHM (BQRx) ORDER DENYING MOTION TO DISMISS CLAIMS AGAINST SHERIFF LEROY BACA AND COUNTY OF LOS ANGELES; GRANTING IN PART AND DENYING IN PART DEFENDANT SUPERVISORS' MOTION TO DISMISS (Filed Nov. 14, 2000)

INTRODUCTION

This case is before the Court on the Motions to Dismiss Plaintiff Javier Rocha's ("Plaintiff") Complaint ("Motions") brought by Defendants Baca, the County of Los Angeles and the Los Angeles County Board of Supervisors. The Complaint alleges claims under 42 U.S.C. § 1983 ("§ 1983") arising out of an incident involving the use of force by deputy sheriffs against Plaintiff at the Los Angeles County Jail Pitchess Detention Center. The constitutional provisions allegedly violated are those in the Fourth, Eighth and Fourteenth Amendments. Plaintiff also alleges state-based tort claims for negligence, battery and infliction of emotional distress. The named defendants include the Los Angeles County Sheriff Leroy Baca, all five members of the Los Angeles County Board of Supervisors ("Supervisors"), the County of Los Angeles, "twenty unknown named defendants," and Deputy Sheriff David

Sameyah,[1] one of the individual deputies who allegedly used force on Plaintiff.

Defendants Baca and Los Angeles County move to dismiss on the ground that Baca is a state agent with Eleventh Amendment immunity to this suit. Baca additionally moves to dismiss on the ground that he is not liable in his individual capacity (collectively "Baca's Mot.").

The Supervisors move to dismiss the Complaint on the grounds that they enjoy either absolute or qualified immunity to this suit and that they are not liable in their individual capacities (collectively "Supervisors' Mot.").

The Court concludes that (1) Baca and Los Angeles County are not immune from suit under the Eleventh Amendment, (2) Plaintiff stated a claim against Baca in his individual capacity, (3) the Supervisors enjoy no absolute immunity, and their qualified immunity does not entitle them to dismissal at this time and (4) the Supervisors may be sued in their individual capacities on a narrow basis only and, to the extent the Complaint could be construed as suing them in their official or supervisory capacities, those claims are dismissed. Accordingly, Defendants' Motions are GRANTED in part and DENIED in part.

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[1] Although he is represented by the same law firm that represents all the defendants, defendant Sameyah answered the Complaint, rather than filing a motion to dismiss.

FACTS AND ALLEGATIONS

"On or about March 17, 1999, at the Los Angeles County Jail Pitches [sic] Detention Center in Saugus, California, Los Angeles County deputy sheriff David Sameyah and 10 unknown LACSD deputy sheriffs used excessive, unreasonable force on the plaintiff, and seriously injured plaintiff." Compl. ¶ 10.

Plaintiff alleges that (1) Los Angeles County is liable under a *Monell* theory; (2) Baca is individually liable under *Monell* because he "knowingly . . . condoned, . . . ratified, [and] took no action to correct . . . the occurrence of the categories of wrongs set forth in this pleading, and/or . . . with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, . . . or to take corrective action," see Compl. ¶ 9:4-15, and failed to investigate and/or discipline prior incidents of police misconduct, see *Id.* ¶ 9:1-5; and (3) the Supervisors are liable under *Monell* for the foregoing acts and omissions solely because of their "prior decisions to pay for . . . punitive damages assessed by juries against the LACSD deputy sheriffs," see *id.* ¶ 9:8-15.

DISCUSSION

I. Legal Standards For a Motion to Dismiss Pursuant to F. R. Civ. P. 12(b)(6)

On a motion to dismiss pursuant to F. R. Civ. P. 12(b)(6) for failure to state a claim, the allegations of the complaint must be accepted as true and are to be construed in the light most favorable to the nonmoving party. *Wyler Summit Partnership v. Turner Broadcasting System, Inc.,* 135 F.3d 658, 661 (9th Cir. 1998). "[A] complaint should not be dismissed unless it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Chang v. Chen,* 80 F.3d 1293, 1296 (9th Cir. 1996).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the complaint may be considered" on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994) *(citing Romani v. Shearson Lehman Hutton,* 929 F.2d 875, 879 n.3 (1st Cir. 1991)).

II. Eleventh Amendment Immunity of the Los Angeles County Sheriff

Defendants Leroy Baca and Los Angeles County argue that because the "Sheriff and all Sheriff's Department officials acts [sic] as state officials in operating the jails . . . . [t]hey are immune from suit[ ] for the claims plaintiffs assert against the public entities and for all actions they take in their official capacities." Baca's Mot. at 2. A state official sued for damages in his official capacity is not a "person" subject to suit within the meaning of § 1983. *Will*

v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Defendants' argument relies on a California Court of Appeal decision holding that:

> [I]n setting policies concerning release of persons from the Los Angeles County Jail, the Los Angeles County Sheriff acts as a state officer performing state law enforcement duties, and not as a policymaker on behalf of the County of Los Angeles. The county's demurrer to plaintiffs third cause of action alleging liability of the county under section 1983 should have been sustained.

County of Los Angeles v. Superior Court (Peters), 80 Cal. Rptr. 2d 860, 868 (1998). Defendants further argue that this Court is bound by the California court's "interpretation of California law." Baca's Mot. at 4.

As Judge Lawrence Karlton has noted, "whether California county sheriffs, when investigating crimes, are county or state officials under California law is unsettled." *Brewster v. County of Shasta,* 112 F. Supp. 2d 1185, 1190 (E.D. Cal. Sept. 2, 2000) (certifying the question for interlocutory appeal). Even assuming that under California judicial precedent the Sheriff is a state officer, this Court would not necessarily be bound by that determination. State law is relevant to, but not necessarily determinative of, whether government officials are policymakers for the state or the county for purposes of § 1983 liability.

> [O]ur inquiry is dependent on an analysis of state law . . . . This is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be

> dependent on the definition of the official's functions under relevant state law.

McMillian v. Monroe County, 520 U.S. 781, 786 (1997) (internal citations omitted) (finding that the balance of the evidence indicates Alabama sheriffs represent the State of Alabama "when executing their law enforcement duties"). The California Court of Appeal can therefore help elucidate the Los Angeles County Sheriff's functions, but its conclusion "simply labeling [him] a state official" does not bind this Court. Absent clear Ninth Circuit authority to the contrary, other district courts have reached the same conclusion, either explicitly or by implication. *See, e.g., Von Colln v. County of Ventura,* 189 F.R.D. 583, 601 (C.D. Cal. 1999) (concluding the *Peters* case "is not controlling here" and "an analysis of California law shows that the sheriff acts as a county policymaker in his operation of the jails"); *Brewster,* 112 F. Supp.2d at 1191 (concluding the "holding in *Thompson* [*v. City of Los Angeles,* 885 F.2d 1439, 1444 (9th Cir. 1989], that sheriffs at least when acting as jail administrators, act as county officials" is binding on district courts until it is overruled),[2] *Leon v. County of San Diego,* 115 F. Supp.2d 1197, __, 2000 WL 1476330, at *5 (S.D. Cal. Sept. 9, 2000) (finding that the sheriff "acts on behalf of the county, not the state, when operating the [county jail] and making policy concerning the treatment of inmates . . . "); *Hawkins v. Baca,* No. CV 00-1078 DDP (CWx) (C.D. Cal. filed June 21, 2000) (holding that "for

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[2] In *Thompson* the Ninth Circuit did not actually hold that with respect to the detention of arrestees the Sheriff functions as a county officer, but it did appear to proceed from that premise, although its language is ambiguous.

purposes of § 1983 liability, Sheriff Baca is a county official rather than a state agent with respect to his operations of the county jail"); *Roe v. County of Lake,* 107 F. Supp. 2d 1146, 1153 (N.D. Cal. 2000) (holding that "[b]ecause a determination of the sheriff's section 1983 liability is a question of federal, not state law, . . . to the extent that *Peters* invites a ruling that Sheriff Mitchell is a state actor, I decline the invitation"). In fact, this Court has found only one published federal case holding that a California sheriff is a state agent immune from § 1983 liability when "acting as a jailer." *Smith v. County of San Mateo,* 1999 WL 672318, at *8 (N.D. Cal. Aug. 20, 1999).

In *McMillian,* the Supreme Court concluded that under Alabama state law, an Alabama sheriff is a state official when executing his "law enforcement" duties. However, as shown above at least six federal courts have found that a sheriff in California is a county rather than a state official. Of these courts, five so concluded after taking into account both the *McMillian* and *Peters* decisions in their analysis of the various California statutory and constitutional provisions that relate to California county sheriffs. (In those statutes and constitutional provisions support for either conclusion can be found.) Most relevant here, at least four courts concluded that a California sheriff is a county official for purposes of overseeing jail operations. Only one court appears to have concluded otherwise. Although the courts all extensively analyzed and persuasively interpreted the relevant state laws, this Court is persuaded by the weight and the reasoning of those authorities in the majority finding that a sheriff in California is a county official. Furthermore, this Court agrees with the *Brewster* court that district courts in this circuit are still bound by the *Thompson*

decision notwithstanding *Peters*. *See* 112 F. Supp. 2d at 1191. The Court therefore holds that with respect to the operations of the county jail, the Los Angeles County Sheriff is not a state agent and he may be sued under § 1983.

The motions of defendants Baca and Los Angeles County to dismiss on Eleventh Amendment grounds are DENIED.

III. Respondeat Superior Liability and Supervisory Liability of Baca

Defendant Baca argues that he is not liable under a theory of respondeat superior. Baca's Mot. at 5. That is correct and Plaintiff does not claim otherwise; he disclaims a theory of respondeat superior liability against Baca. Opp. to Baca's Mot. at 19 n.1. In fact, Baca's argument suggests that he actually challenges the allegations that he is subject to supervisory liability. *Id.; see also* Compl. ¶ 9:14-27 (individual liability premised upon failure to train, supervise, monitor and take corrective action is consistent with a theory of supervisory liability).

Baca may be held liable in his individual capacity on a theory of supervisory liability for his "own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivations[;] . . . or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir. 1991) (internal citations and quotation marks omitted). Plaintiff here alleges that Baca is liable because he "knowingly . . . condoned . . . . ratified, [and] took no action to correct . . . the occurrence of the categories of wrongs set forth in this

pleading, and/or . . . with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, . . . or to take corrective action . . . . " Compl. ¶ 9:4-15. Such allegations clearly are intended to paraphrase the various standards for individual supervisory liability in *Larez* and they sufficiently state a claim against Baca in his individual capacity at this stage of the proceedings. The court notes, however, that it is all-too-easy for an attorney to use boilerplate language in alleging such a claim; whether there are facts to support the claim is another matter, to be addressed later.

Defendant Baca's motion to dismiss the claim for individual supervisory liability is therefore DENIED.[3]

IV. Liability of the County Supervisors

A. Absolute Immunity

The Supervisors argue that they cannot be liable based on their past votes to indemnify deputies against punitive damage awards because they are entitled to absolute legislative immunity for such votes. Supervisors' Mot. at 4. Confronted with clear Ninth Circuit precedent denying absolute legislative immunity for decisions whether to pay punitive damage awards, see *Trevino v.*

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[3] In reluctantly reaching this conclusion, the Court notes that Baca has been sued on this theory in other actions. If after discovery, trial or otherwise there is a finding that in fact he has not failed to train, supervise and take corrective action against miscreant deputies assigned to the jail, and has not condoned or ratified their misconduct, then future complaints alleging these boilerplate-type claims, or lawsuits that continue to prosecute them, might be subject to sanctions under Fed. R. Civ. P. 11, 28 U.S.C. § 1927 or otherwise.

Gates (Trevino I), 23 F.3d 1480, 1482 (9th Cir. 1994), the Supervisors argue that the "decision in *Trevino I* is in direct conflict with, and otherwise does not withstand the expanded rule that, local legislators are entitled to absolute immunity as defined by the Supreme Court in *Bogan* [*v. Scott-Harris,* 523 U.S. 44 (1998)]." Supervisors' Reply at 6.

The Supervisors previously advanced this same argument in this District and were unsuccessful:

> Although it is clear that the *Bogan* decision expanded absolute immunity to local legislators, the Court is not convinced that it meaningfully expanded the concept of absolute immunity in general. As has always been the case, absolute immunity depends on whether the legislator in question is acting in a legislative capacity. *Bogan* merely clarified that, in determining whether particular acts are legislature, the actors' subjective intent and motives should not be considered. This Court does not believe that *Bogan* overruled *Trevino I.* In *Trevino I,* the Ninth Circuit held that the act of deciding whether to indemnify police officers for punitive damage awards is not a legislative act because it does not involve the formulation of policy and is not directed to the public as a whole. Unlike the act in *Bogan,* which involved the quintessentially legislative act of voting on a city budget, the act in *Trevino I* involved voting on whether to indemnify a specific individual in a specific case. The Court thus finds that the ultimate holding in *Trevino I* is still the law in this circuit, and that, based on this clear Ninth Circuit authority, the Supervisors are not entitled to absolute immunity.

Hawkins v. Baca (Hawkins II), 114 F. Supp. 2d 987, 991 (C.D. Cal. Sept. 22, 2000). This Court's conclusion is the same, *i.e.,* the *Bogan* decision does not overrule the clear Ninth Circuit precedent in the *Trevino* decisions.

The Supervisors' motion to dismiss on the ground of absolute immunity is DENIED.

B. Qualified Immunity

The Supervisors also argue that they are entitled to qualified immunity. Supervisor's Mot. at 7. They rely heavily on *Hernandez v.. Gates,* 100 F. Supp. 2d 1209 (C.D. Cal. 2000), in which the District Court held that members of the Los Angeles City Council have qualified immunity entitling them to dismissal under Fed. R. Civ. P.12(b)(6). That decision relied on *Trevino v. Gates (Trevino II),* 99 F.3d 911, 918 (9th Cir. 1996). In *Trevino II* the Ninth Circuit examined whether city council members could be liable under § 1983 for voting to indemnify police officers against punitive damage awards in excessive force cases. Officials sued under § 1983 are entitled to qualified immunity if: "(1) the 'right' they allegedly violated was not 'clearly established' at the time of the violation, or (2) if a reasonable [official] would have thought that the defendants' actions were constitutional." *Id.* at 916. The *Trevino II* court found that as of the time that the council members voted to indemnify the officers "the law [was] not clearly established that a policy of indemnifying punitive damage awards violates constitutional rights." *Id.* at 918. It also observed that: "A city council does not violate section 1983 if it indemnifies officers against punitive damage awards on a discretionary, case by case basis, and complies in good faith with the requirements of Cal. Gov. Code § 825(b)."

Id.[4] In *Trevino II* the District Court had found on a *summary judgment* motion that the plaintiff had failed to demonstrate a clearly established right. Having upheld the grant of summary judgment on that basis, the Ninth Circuit did not address the second prong (i.e., whether the legislators had acted in good faith). *Id.*

Trevino II was decided more than four years ago. Very recently the Ninth Circuit clarified the interplay between the requirement of good faith and qualified immunity. In reversing a District Court's denial of summary judgment sought by members of the Los Angeles City Council, the Ninth Circuit stated:

> In order to defeat the council members' motion for summary judgment [the plaintiff] must present some evidence that the council members did not implement section 825's indemnification procedure in good faith . . .

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[4] Cal. Gov. Code § 825(b) reads in relevant part:

> . . . [A] public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:
>
> (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.
>
> (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.
>
> (3) Payment of the claim or judgment would be in the best interests of the public entity.

Cunningham v. Gates, 2000 WL 1617016 at *16 (9th Cir. Oct. 31, 2000). The Ninth Circuit then went on to overrule the District Court's denial of summary judgment:

> The council members' evidence suggests that they implemented section 825's indemnification procedure in good faith in accordance with *Trevino.* Indeed, rather than following a policy of rubber-stamping City Attorney recommendations, the undisputed evidence shows that the council members considered each claim on a case-by-case basis. [The plaintiff]'s conclusory allegations cannot withstand the council members' motion for summary judgment [on qualified immunity grounds].

Id.

Here, this Court anticipates that if plaintiff fails to come up with evidence of bad faith (or evidence of a lack of good faith) on the part of the supervisors, that will be sufficient to entitle them to summary judgment. Similarly, affirmative proof by the supervisors of their good faith would entitle them to summary judgment, as was the case in *Cunningham v. Gates.* But this is a motion to dismiss, and Plaintiff alleges that the Supervisors' prior decisions to indemnify deputies for punitive damage awards were made "knowingly, or grossly negligently, or with deliberate indifference to the rights allegedly violated, [and they] caused to come into being, maintained, fostered, condoned, approved of, either before or after the fact, ratified, took no action to correct, an official policy, practice, procedure, or custom of permitting the occurrence of the categories of wrongs set forth in this pleading, and/or [were made] improperly, inadequately, with deliberate indifference to the constitutional or other federal rights of persons . . ."

Compl. ¶ 9:2-12. True, these too are boilerplate claims, and this Court intends to assess very carefully whether there is evidence to support them; but read in the light most favorable to Plaintiff, these allegations sufficiently plead bad faith to survive a motion to dismiss. *See Hawkins II*, 114 F. Supp. 2d at 992 (holding that the plaintiff sufficiently pled bad faith by alleging that the Supervisors "have a policy of 'routinely rubber-stamping indemnification payments of punitive damages assessed against deputy sheriffs' ").[5]

The Supervisors' motion to dismiss on the ground of qualified immunity is DENIED.[6]

C. Causation

In their Reply, the Supervisors for the first time briefed the argument that Plaintiff failed to allege facts sufficient to show causation. Supervisor's Reply at 9. The Court will not dismiss a complaint based on a theory that Plaintiff did not have an adequate opportunity to oppose,

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[5] In reluctantly reaching this conclusion, this Court is troubled by the prospect that a plaintiff who survives a motion to dismiss (which is not difficult to do) will then be in a position to conduct discovery that, if abused or unnecessarily extensive, could seriously interfere with the duties of elected officials. Perhaps counsel for such "local" legislative bodies as city councils or boards of supervisors can explore means, *e.g.*, the preparation of transcripts, that would reflect the manner in which the decision-making process was carried out and thereby preclude the need for serial depositions.

[6] Although in a very considered opinion, *Hernandez v. Gates, supra*. reached the opposite conclusion and result, this Court notes that *Hernandez* does not take into account that the standards on a 12(b)(6) motion differ from those in a summary judgment motion.

but it is nevertheless worth noting that the Supervisors concede that "the issue of causation is a question for the trier of fact, . . . [unless] there is no genuine issue of material fact." *Id.* The Supervisors' own characterization makes it clear that while summary judgment may be appropriate if there is no *evidence* supporting causation, a determination at this stage would be premature. *See, e.g., Arnold v. International Bus. Machines Corp.*, 637 F.2d 1350, 1356, (9th Cir. 1981) ("If [the plaintiff] could point to any fact that would tend to show that defendants had some control or power over the [actors], and that defendants directed the [actors] to take action against [the plaintiff], there would certainly be a dispute of material fact on the issue of proximate cause [under § 1983] sufficient to reverse the summary judgment."). The Supervisors have not cited a single case resolving § 1983 causation issues on a motion to dismiss. Their motion to dismiss on the ground of causation is DENIED.

D. Liability in Their Individual Capacities

Plaintiff's Complaint is internally contradictory as to whether the Supervisors are sued in their official or individual capacities, or both. Compare Compl. ¶ 5 ("Each . . . defendant is sued in [both capacities]") with ¶ 9, p4:23-27 ("All Monell defendants, *except* the County Supervisors, are sued on this [Monell] theory both in their individual/personal capacities as well as in their official capacities.") The Supervisors argue that they "cannot be held personally liable under Section 1983 for the constitutional deprivations caused by subordinates, absent [their] participation or direction in the deprivation." Supervisors' Mot. at 10. Plaintiff's only response is that the Supervisors "also are liable in their official capacities." Opp. to

Supervisors' Mot. at 5. Based on Plaintiff's opposition memo and his counsel's argument at the hearing, the Court concludes that Plaintiff has sued the Supervisors in both their official and their individual capacities, but not on a *respondeat superior* basis. Instead of wasting time with a new round of pleadings that would only cure possible linguistic ambiguities, the Court will construe the complaint to allege that the Supervisors are liable (a) in their official capacities for promoting and maintaining (etc.) an unconstitutional policy and practice concerning indemnification and (b) in their individual capacities for having carried out that policy in a manner that allegedly caused harm to Plaintiff.

As to liability in their official capacities under construction (a), above, the Court notes that such claims would be duplicative because the County of Los Angeles is also a defendant. "There is no longer a need to bring official- capacity actions against local government officials, for under *Monell, supra,* local government units can be sued directly for damages and injunctive or declaratory relief." *Kentucky v. Graham,* 473 U.S. 159, 167 n.14 (1985). The Supervisors therefore need not be named separately in their official capacities and claims against them in that capacity are hereby DISMISSED as duplicative.

Plaintiff may conduct discovery and otherwise continue to litigate his claims only under construction (b), above; Plaintiff may not seek recovery or other relief on any theory that the Supervisors are liable because of what they allegedly did in their official capacities or because of what deputy sheriffs allegedly did as the supposed subordinates of the Supervisors.

The Supervisors' motion to dismiss the claims against them in their individual capacities is therefore GRANTED in part and DENIED in part.

V. Local Rule 7.4.1

Plaintiff also argues that the motion papers should not be considered because Defendants failed to comply in good faith with Local Rule 7.4.1. Plaintiff is wrong. Defense counsel requested a 7.4.1 meeting on September 15, 2000. Plaintiff responded by demanding that defense counsel "cite to us any authorities you may have to support the contentions in your letter, so that we may review them before we meet with you . . . " There is no such precondition to a Local Rule 7.4.1 meeting and the Court therefore finds that Defendants attempted in good faith to meet and confer prior to filing these Motions.

CONCLUSION

For all the foregoing reasons, Defendants' Motion is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

DATE: November 14, 2000

/s/ A. Howard Matz
A. Howard Matz
United States
District Judge

Article 4

INDEMNIFICATION OF PUBLIC EMPLOYEES

§ 825. Defense by public entity; payments of judgments, compromises or settlements; punitive damages; memorandum of understanding; elected officials; tortious influencing of judicial actions

* * *

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity, other than the state as defined in Section 900.6, is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

* * *

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAVIER ROCHA Plaintiff, v. LEE BACA, YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, PETE SCHABARUM, DEANE DANA, MICHAEL ANTONOVICH, DAVID SAMEYAH, TWENTY UNKNOWN NAMED DEFENDANTS, all sued in their individual and official capacities, and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	No. CV- **COMPLAINT** (Damages for deprivation of civil rights; pendant state tort claims) **JURY DEMAND**

JURISDICTION AND VENUE

1. The claims made herein are asserted pursuant to the United States Constitution, and 42 U.S.C. 1983, *et seq.*, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331 and 1343. The state law claims made herein are made based on California law, and with respect

to those claims, jurisdiction is based on the supplemental jurisdiction of the Court.

2. The acts and/or omissions complained of occurred in the Central District of California, and, therefore, venue lies in this District pursuant to 28 U.S.C. 1391.

THE PARTIES

3. The plaintiff Javier Rocha was an inhabitant of and within the jurisdiction of the United States of America at all times herein alleged, and was and is a citizen of the United States of America. Plaintiff continuously has been imprisoned and under a sentence of penal custody for a term of less than life since the date of the underlying incident. March 17, 1999, on which the plaintiff's claims against defendants are based, therefore, the statute of limitations on plaintiff's claims is tolled for the period of his confinement pursuant to Cal. Code Civ. Proc. Sec. 352, and has not yet begun to run.

4. Defendant County of Los Angeles is a California County; defendants Antonovich, Burke, Dana, Knabe, Molina, Yaroslavsky, all were or are Los Angeles County Supervisors ("County Supervisors"); Lee Baca, at all relevant times herein, was and is a California police officer and legal head and policymaker for the County of Los Angeles Sheriff's Department ("LACSD"); defendant David Sameyah was and is a Los Angeles County Sheriff's Department ("LACSD") deputy sheriff, and Unknown Named defendants Nos. 1-20 are Los Angeles County ("LAC") employees and/or LACSD deputy sheriffs who may be responsible for the conduct alleged hereinbelow.

5. Each and every defendant who is a natural person is sued in both his/her individual/personal capacity, as well as in his/her official capacity if he/she had any policymaking duties, functions, or responsibilities with respect to the matters alleged herein.

FACTS COMMON TO ALL COUNTS

6. Each and every allegation set forth in each and every averment of this pleading hereby is incorporated by this reference in each and every other averment and allegation of this pleading.

7. The plaintiff was deprived of an interest protected by the Constitution and/or laws of the United States of America, and each and every defendant caused, by commission or omission, such deprivation while acting under color of state law.

8. All acts and/or omissions perpetrated by each defendant, except the governmental entity or any defendant only in his/her official capacity, were engaged in maliciously, callously, oppressively, wantonly, recklessly; with deliberate indifference to the rights allegedly violated, despicably, and with evil motive and/or intent, in disregard of the rights of the plaintiff.

9. Any governmental entity defendant, and any defendant in his/her official capacity knowingly, or grossly negligently, or with deliberate indifference to the rights allegedly violated, caused to come into being, maintained, fostered, condoned, approved of, either before the fact or after the fact, ratified, took no action to correct, an official policy, practice, procedure, or custom of permitting the occurrence of the categories of wrongs set forth in this

pleading, and/or improperly, inadequately, with deliberate indifference to the constitutional or other federal rights of persons, grossly negligently, with reckless disregard to constitutional or other federal rights, failed properly to train, to supervise, to retrain, if necessary, to monitor, or to take corrective action with respect to the police and with respect to the types of wrongful conduct alleged in this pleading, so that each one of them is legally responsible for all of the injuries and/or damages sustained by the plaintiff pursuant to the principles set forth in *Monell v. New York City Dept. of Social Services*, and its progeny.

All *Monell* defendants, except the County Supervisor defendants, are sued on this theory both in their individual/personal capacities as well as in their official capacities.

Also, it is alleged that prior failures to investigate police misconduct and/or to discipline police found culpable for misconduct, inadequate investigations into and/or inadequate discipline imposed for police misconduct, and/or a failure to investigate or to discipline the police defendants in this case, all make the *Monell* defendants, except the County Supervisor defendants, liable for the police misconduct in this case.

Also, it is alleged that prior decisions to pay for, or to indemnify for, or to hold harmless for, or to bond for punitive damages assessed by juries against the LACSD deputy sheriffs is a basis for liability in this case, as it constitutes conduct that falls within the definitions of the first sentence of this averment, and defendants Los Angeles County Supervisors are liable for all conduct alleged herein only on this basis.

10. On or about March 17, 1999, at the Los Angeles County Jail Pitches [sic] Detention Center in Saugus, California, Los Angeles County deputy sheriff David Sameyah and 10 unknown LACSD deputy sheriffs used excessive, unreasonable force on the plaintiff, and seriously injured plaintiff.

COUNT ONE

11. At the time of the incident alleged in this case, set forth at averment 10, immediately above, the rights of persons within the jurisdiction of the United States of America under Amendment IV to the United States Constitution to be secure in home, person, papers, and effects against unreasonable searches and/or seizures, and not to be subjected to the use of unreasonable or excessive force were in effect, and any individual police officer defendant engaged in conduct (including actionable omissions, if applicable), as set forth in averment 10, immediately above, violated those Fourth Amendment rights, and thereby also violated the Fourteenth Amendment to the United States Constitution, and by virtue thereof, each such police officer is liable to the plaintiff for damages, either nominal or compensatory, according to proof.

COUNT TWO

12. At the time of the incident or incidents alleged in this case, set forth hereinabove in averment 10, the rights of persons within the jurisdiction of the United States of America under the Fourteenth Amendment to the United States Constitution not to suffer a deprivation of due process or of equal protection of the laws, and to be free

from cruel and unusual punishment, were in effect, and any individual police officer defendant engaged in conduct, as set forth hereinabove in averment 10, caused a violation of those rights, and by virtue thereof, each such police officer is liable to the plaintiff for damages, either nominal or compensatory, according to proof.

COUNT THREE

13. At the time of the incident or incidents alleged in this case, set forth hereinabove in averment 10, the right of persons within the jurisdiction of the United States of America under Amendment VIII to the United States Constitution to be free from cruel and unusual punishment were in effect, and any individual police officer engaged in conduct, as set forth hereinabove in averment 10, that violated that Eighth Amendment right, thereby violated the Fourteenth Amendment to the United States Constitution, and by virtue thereof, each such police officer is liable to plaintiff for damages, either nominal or compensatory, according to proof.

COUNT FOUR

14. Also, it is alleged that, if there is more than one police officer defendant in this action, there was an agreement or understanding between or among such police to engage in the conduct alleged herein to be wrongful, and that there was the commission of an overt act in furtherance of said conspiracy.

STATE TORT CLAIMS

COUNT FIVE

(NEGLIGENCE)

15. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 16-24 of this Complaint.

16. Plaintiff timely filed a tort claim with the County of Los Angeles within six months from the date of the incident, and on January 14, 2000, said tort claim was denied by the County of Los Angeles. A copy of the tort claim and denial of said claim by the County of Los Angeles Board of Supervisors is attached hereto as Exhibits 1 and 2 respectively, and incorporated herein by this reference.

17. Plaintiff alleges that defendants County of Los Angeles, Baca, defendant Sameyah, and 10 unknown named LACSD deputy sheriff defendants, owed him a duty of care, and that defendant unknown named Sameyah, and the 10 unknown named LACSD deputy sheriffs, and each of them, negligently, carelessly, and in reckless disregard for plaintiff's safety, breached that duty of care by negligently and carelessly using excessive, unreasonable force on plaintiff, thereby seriously injuring plaintiff.

18. Plaintiff further alleges that defendant Baca and the County of Los Angeles negligently hired and retained defendant Sameyah, and the 10 unknown named LACSD deputy sheriffs, who negligently, carelessly, and in reckless disregard for plaintiff's safety injured and battered plaintiff, even though defendant Baca and the County of Los Angeles knew or should have known that defendant

Sameyah and the 10 unknown named deputy sheriffs and each of them had a propensity for using excessive force and battering and injuring Jail inmates, and that said deputy sheriffs had violent propensities and were unfit for duty. Plaintiff alleges that all defendants' breach of their duty was a direct and legal cause of plaintiffs' damages.

COUNT SIX

(BATTERY)

19. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

20. Plaintiff asserts a claim of battery against defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, based upon the unlawful touching of plaintiff by defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, and each of them, which caused plaintiff to suffer injury, damages, loss and harm.

COUNT SEVEN

(NEGLIGENT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

21. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

22. Plaintiff asserts a claim for the negligent and intentional infliction of emotional distress against defendant Sameyah, and 10 LACSD unknown named deputy sheriffs, and each of them, for engaging in outrageous conduct intended to cause plaintiff to suffer emotional

distress, or with reckless disregard of the probability of causing plaintiff to suffer emotional distress, or by negligently causing plaintiff to suffer serious emotional distress, and plaintiff suffered severe emotional distress which was caused by the outrageous conduct of said defendants.

COUNT EIGHT

(RESPONDEAT SUPERIOR)

23. Plaintiff realleges and incorporates by this reference, each and every allegation set forth in averments 1-8, 10 and 15-24 of this Complaint.

24. Defendant Sameyah, and the 10 unknown named LACSD deputy sheriffs were employees of defendant County of Los Angeles, and were acting in the course and scope of their employment when they engaged in the wrongful conduct, namely, the negligently causing injury to plaintiff, battering plaintiff, and their intentional and negligent infliction of emotional distress which caused plaintiff to suffer injury, damages, loss and harm.

WHEREFORE, the plaintiff requests damages, as follows, according to proof, against each defendant:

1. Nominal or general damages;

2. Punitive damages;

3. Interest from the date of the wrongful conduct;

4. Costs of suit, including attorneys' fees; and,

5. Such other relief as may be warranted or is just and proper.

DEMAND FOR JURY

Trial by jury of all issues is demanded.

YAGMAN & YAGMAN
& REICHMANN

By: /s/ _____
MARION R. YAGMAN

(2)

No. 02-236

Supreme Court, U.S.
FILED
SEP 9 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

LOUIS R. MILLER, III
Counsel of Record for Petitioners
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SUMMARY OF THE ARGUMENT

Pursuant to Supreme Court Rule 15.8, Petitioners Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky and Michael Antonovich hereby submit this supplemental brief to address Respondent Javier Rocha's recent dismissal of this case in the district court.

On July 18, 2002, counsel for Respondent advised Petitioners' counsel that he would dismiss Petitioners from this case. Petitioners' counsel prepared a stipulation of dismissal, executed it on that very same day, and personally delivered it to the offices of Respondent's counsel. Petitioners' counsel followed up with a letter and a telephone call to Respondent's counsel to inquire about the status of the dismissal. No response was ever received.

This petition for *writ of certiorari* was then filed on August 13, 2002. Respondent's counsel received his service copy of the petition on August 15, 2002. On August 16, 2002, the next day, Respondent filed the dismissal in the district court. *See* App. at 1-2.

Respondent manipulatively dismissed the case below in an effort to preclude this Court from considering the petition, contrary to established law. *See, e.g., Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-662, 113 S.Ct. 2297 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1982). If Respondent's tactical dismissal is allowed to moot the petition, justice will be undermined and frustrated.

Respondent's counsel boasts that he has sued Petitioners, and promises to keep suing Petitioners, based upon the same claim raised here, namely, that Petitioners

are personally liable because of their alleged votes to indemnify punitive damage awards imposed against Sheriff's deputies. True to his word, counsel has raised this claim in at least thirteen other lawsuits against Petitioners. The Ninth Circuit's errant precedent was the basis for denying absolute immunity in all of these cases. Most of these cases also delayed adjudicating qualified immunity, resulting in costly and harassing discovery.

Absolute and/or qualified immunity should have been applied in all these cases. Instead, three are still pending. Further, Respondent's counsel has filed, but not yet served, at least three more identical suits against Petitioners. Respondent's counsel also has promised to keep suing Petitioners "in every single case" he files in the future. *See* App. at 17:8-9.

ARGUMENT

In *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379 (1979), this Court stated that the burden of establishing mootness "is a heavy one." The Court also stated that the voluntary termination of the underlying dispute does not render the matter moot if there is a "reasonable expectation" that it will recur in the future. *Id.*; *see United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897 (1953) (if voluntary cessation rendered a case moot, "the courts would be compelled to leave the defendant . . . free to return to his old ways") (internal citations omitted).

In the *City of Mesquite* decision, a city ordinance prohibited an owner of a coin-operated amusement center who had "connections with criminal elements" from

obtaining a business license. *City of Mesquite*, 455 U.S. at 288. The petitioner was denied a license on this ground and sued, claiming that the "criminal elements" restriction was impermissibly vague. *Id.* at 287. In opposition, the city argued that the case was moot because the ordinance was amended to remove the "criminal element" restriction. *Id.* at 288. This Court rejected the mootness argument and decided the case on its merits:

> "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case, the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment was vacated."

Id. at 289.

Similarly, in *City of Jacksonville*, the petitioner challenged an ordinance requiring that a certain percentage of city contracts be awarded to minority owned businesses. *City of Jacksonville*, 508 U.S. at 658-59. The city repealed the underlying ordinance and replaced it with a slightly different one twenty-two days after this Court granted *certiorari*. *Id.* at 660. The city then moved in this Court to dismiss the appeal as moot. *Id.* at 660. Relying on *City of Mesquite*, the Court denied the motion. *Id.* at 662.

The same result should obtain here. Three of the other thirteen section 1983 suits[1] brought against Petitioners by

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[1] *Bell v. Baca*, 01-CV-02067; *Benas v. Baca*, 00-CV-11507 (pending); *Berry v. Baca*, 01-CV-02069; *Casares v. Baca*, 99-CV-07817; *Chweya v. Baca*, 00-CV-07150 (pending); *Hart v. Baca*, 01-CV-01866; *Hawkins v.*

(Continued on following page)

Respondent's counsel are still pending: *Benas v. Baca*, 00-CV-11507; *Chweya v. Baca*, 00-CV-07150 (which has been stayed while the plaintiff appeals the district court's finding of no underlying constitutional violation); and *Moore v. Baca*, 01-CV-03552 (in which only plaintiffs' official capacity claims against Petitioners remain). Respondent's counsel also filed, but has not yet served, at least three more identical suits against Petitioners[3] and has promised to keep suing them in the future. *See* App. at 16-17:5-10.

Unless this Court intervenes, Petitioners will continue to be deprived of absolute and qualified immunity in both the present cases and the future ones which Respondent's counsel promises to bring. Respondent's dismissal is a transparent attempt to preclude this Court from bringing the Ninth Circuit in line with this Court's absolute and qualified immunity jurisprudence.

CONCLUSION

For the foregoing reasons, Petitioners assert that the issues raised in their petition for *writ of certiorari* are not rendered moot by way of Respondent's dismissal of this action in the district court below and request that this

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Baca, 00-CV-01078; *King v. Baca*, 00-CV-11178; *Moore v. Baca*, 01-CV-03552 (pending); *Moreno v. Baca*, 00-CV-07149; *Mortimer v. Baca*, 00-CV-13002; *L. Navarro v. Baca*, 99-CV-08888; and *R. Navarro v. Baca*, 98-CV-7434.

[3] *Green v. Baca*, 02-CV-04744; *Harris v. Baca*, 01-10905; and *Thomas v. Baca*, 01-CV-10903.

Court grant their petition to prevent the erosion of absolute and qualified immunity with respect to elected legislators.

Respectfully submitted,

LOUIS R. MILLER, III
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Western Division

JAVIER ROCHA, Plaintiff, v. LEE BACA; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY; PETE SCHABARUM; DEANE DANA; MICHAEL ANTONOVICH; DAVID SAMEYAH; TWENTY UNKNOWN NAMED DEFENDANTS; all sued in their individual and official capacities; and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	Case No. **STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE OF THE SUPERVISOR DEFENDANTS** [F.R.C.P. 41(a)(1)]

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Javier Rocha ("Plaintiff") and Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich (the "Supervisor Defendants") by and through their respective counsel, hereby stipulate to the dismissal with prejudice of the above-captioned action as to the Supervisor Defendants, with each party bearing their own costs.

Dated: July 18, 2002

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Andrew Baum
ANDREW I. BAUM
Attorneys for Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich

Dated: July 10, 2002

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD

By: /s/ Stephen Yagman
STEPHEN YAGMAN
Attorney for Plaintiff Javier Rocha

IT IS SO ORDERED.

Dated: August 19, 2002

/s/ A. Howard Matz
The Honorable A. Howard Matz
United States District Court Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

L.B. MOORE, Plaintiff, vs. LEROY BACA, ET AL., Defendants.	CASE NO: CV 01-3552-FMC(RCx) CIVIL Los Angeles, California Wednesday, January 23, 2002 (9:00 a.m.)

DISCOVERY MOTION(S)

BEFORE THE HONORABLE ROSALYN M. CHAPMAN, UNITED STATES MAGISTRATE JUDGE

[2] APPEARANCES FOR:

Plaintiff:	STEPHEN YAGMAN, ESQ. Yagman Yagman & Reichmann 723 Ocean Front Walk Venice, CA 90291 310 452-3200
Defendants:	PAUL B. BEACH, ESQ. Franscell Strickland, et al. 225 S. Lake Avenue, Penthouse Suite Pasadena, CA 91101 626 304-7830 ANDREW BAUM, ESQ.
Court Recorder:	None
Courtroom Deputy:	Debra Taylor-Spears
Transcriber:	Pattie Walker Exceptional Reporting Services P.O. Box 61850 Houston, Texas 77208 713 670-7774

[3] **Los Angeles, California; Wednesday, January 23, 2002**

THE COURT: Good morning. Please be seated.

THE CLERK: Calling Civil Case Number 01-3552, *L. B. Moore versus Leroy Baca, et al.*

Counsel, please state your appearances.

MR. YAGMAN: Good morning, your Honor. Stephen Yagman for the Plaintiffs.

I apologize for being late. I had a very tiring day yesterday, and I – when I went home, I went to sleep. But I didn't notice that on my car dashboard it said, "Fuel very low." And I got on the Santa Monica Freeway this morning, and I got to about La Cienega and it said, "You're out of fuel." And I decided rather than take the chance of running out completely, I got off the freeway, got two or three gallons of gas, and got in my car and came back here. I've never done that before. And I'm sorry I was late.

THE COURT: It's a fascinating story except I thought Mr. Reichman was handling the discovery for the Plaintiffs.

MR. YAGMAN: Well, he's not. And I think there's a big misunderstanding with respect to that. That –

THE COURT: Okay. We should talk about that then, Mr. Yagman.

MR. YAGMAN: I'll address that right now. Mr. Reichman is not handling discovery. He is the lead discovery counsel.

[4] We could have picked anybody to be that: me, Mr. Reichmann, Katherine Bloomfield, or Marian Yagman. We

happened to select Mr. Reichmann. He's supposed to be in charge of all discovery, and he is.

And if that's going to create a problem – and I see that the Defense counsel have been moaning about that –

THE COURT: I'll have to look at my General Order and see if – if the lead counsel's the one who's supposed to show up at hearings. I, frankly, don't remember what the General Order said about that.

MR. YAGMAN: I remember what it says. And it says that the only duties of the lead discovery counsel are to be available at all times to modify, correct, or whatever – anything that any other attorneys do.

I didn't think that this Order and the way we decided to address it would cause a problem. But Defense counsel have attempted to use it to bang me over the head with Joe Reichman. And that's going to have to stop or else, I'll just become lead discovery counsel. And then they won't be able to do that anymore.

I don't think that either the Court or Defense counsel can decide how we handle the action on our side so long as what we –

THE COURT: No. But we can demand that people be available when they need them to be available. And we'll talk [5] about that some other time.

MR. YAGMAN: And Mr. Reichman has always been available.

THE COURT: And he has always been available and he's cooperative and he gives out his fax number and

all those things. And that makes things move much more smoothly.

MR. YAGMAN: Right. And that's why we did it. But using that to support an implication that I'm not cooperative or there's something wrong with not having a line dedicated to a fax is just bologna.

THE COURT: Well, I think there is something wrong with that. But we'll talk about that some other time.

MR. YAGMAN: Then I'm going to substitute –

THE COURT: I think it puts you –

MR. YAGMAN: – as lead discovery counsel for Mr. Reichman.

THE COURT: I'm not talking about –

MR. YAGMAN: And we'll put up – put pay to that.

THE COURT: – this case. I'm talking about other cases. For example, I think the fact that you don't get orders the day they're issued – when the Court can send them out like in a different matter than you and I are settling, Mr. Yagman – presents a problem. I think it's better if you get things promptly. So I think it's better if you do have a fax.

I'm not saying that goes to this particular case. I [6] think it's been very helpful to have Mr. Reichman as lead counsel.

MR. YAGMAN: And that's –

THE COURT: So –

MR. YAGMAN: – why we did that.

THE COURT: That's good. So let's not get in a tiff about that at this point. Let me look at my Order when I get a chance.

MR. YAGMAN: So long as nobody tries to hit me in the head with that because if they do, then that'll change and I'll be lead discovery counsel.

THE COURT: I haven't seen either of these guys jump up –

MR. YAGMAN: It's come –

THE COURT: – and hit you in the head.

MR. YAGMAN: You haven't seen the correspondence –

THE COURT: Okay.

MR. YAGMAN: – going back and forth. And Mr. Reichman said in the first instance. "Don't give all that to the Court, and don't tell the Court how Mr. Baum threatened Mr. Reichman."

THE COURT: Well, we're –

MR. YAGMAN: You know –

THE COURT: – not going to deal with personality issues at this point.

[7] Last time I saw Mr. Baum, I told him to be quiet and that I preferred dealing with someone else from his side. So I'm fair across the board on this.

MR. YAGMAN: Okay.

THE COURT: So have a seat, Mr. Yagman.

MR. YAGMAN: By the way, the reason I'm here is because Mr. Reichman had to go to San Francisco. Otherwise, he would be here with me.

THE COURT: Okay. And I can't find my General Order yet.

Let the Defendants make their appearances please.

MR. BEACH: Good morning, Your Honor. Paul Beach for Defendant Baca.

MR. BAUM: Good morning, your Honor. Andrew Baum for the Supervisor Defendants.

THE COURT: Okay. Good morning, gentlemen.

I told you I was a little distressed about the posture in which these issues were presented to me. This isn't the only case recently in which I've had discovery issues presented in which I felt was an advisory opinion posture. And I don't like doing that.

Did I miss something? Are there outstanding Orders setting the deposition dates that I just don't know about?

MR. YAGMAN: I think what you – what you might characterize as something that you've missed but which really [8] couldn't be called that is this: Mr. Reichman and I understood your Order about how depositions were to be done as to not require a Notice of Deposition, to require counsel to try to cooperate.

And rather than arbitrarily setting a date with a notice and causing the tumult or the stress or the adversariness that comes from that, that what we were supposed

to do was send out a letter and say, "We'd like to do this," try to get dates back. And then if everyone agreed, we would do it. But if they didn't, we'd bring it before the Court rather than structuring it so that it was kind of adversarily, "Here's the notice. Be there on this date."

We thought this is what you wanted us to do and get a ruling from the Court before the issue was forced by a deposition notice.

Had I had – or Mr. Reichman – had any idea that you wanted us to do it the other way, it's not very difficult to send out a deposition notice.

THE COURT: Okay. Then I am definitely going to have to look at my General Order again and –

MR. YAGMAN: It's right around the end of October the beginning of November.

THE COURT: Okay.

MR. YAGMAN: And the first Order was October 17th. And then, I think, the General Order was –

[9] THE COURT: Thank you. I –

MR. YAGMAN: – several days after that.

THE COURT: Thank you.

All right. It's Number 60 on the Docket Sheet.

MR. BAUM: If I may, your Honor.

THE COURT: yes.

MR. BAUM: I – my impression was the same as –

THE COURT: The same.

MR. BAUM: – represented by Plaintiff's counsel.

THE COURT: Well, then clearly, it must be my fault if all the parties understood it that way. And I'll take a look, and I'll correct my Order if that's the case. And this is, as I said, not the only case that's happened in. So perhaps that is my problem.

Having said that, I nevertheless addressed the Order because I realize that you could do a deposition notice at any time. And I realize there was an issue of significance between the parties.

My ruling is against the Plaintiffs. So I guess the best thing to do is –

Have you had a chance to read my ruling?

MR. YAGMAN: I have.

THE COURT: Then this is your opportunity to argue to me why I'm wrong, Mr. Yagman.

MR. YAGMAN: It's the hard way that interrogatory [10] answers often are the responses of counsel that are suggested to clients – because I do the same thing myself, and I think all attorneys do. We draft answers based on –

I don't think this is funny. I really don't. And if I'm going to have to deal with that sort of thing, I'm going to respond in kind. And I refer to Mr. Beach sitting there king of giggling.

Now –

THE COURT: Don't giggle, Mr. Beach.

MR. BEACH: I'm sorry if I said anything.

THE COURT: Go ahead, Mr. Yagman.

MR. YAGMAN: The way I respond to interrogatories for our client is: I review the file, I speak to the client, and then I draft answers. And I put them in my language because I look out for things that might go in answers that could be harmful.

All of the answers we prepare are truthful, but they're basically something that I or other lawyers in the firm draft. We then discuss them with the clients. And if everything is truthful and accurate, the client verifies it. I believe that other attorneys basically do it the same way, from having worked in other firms and been in other offices and having questioned defendants in cases about how their interrogatory answers were done. So what you're basically getting is an answer that has an awful lot of input from an [11] attorney with an interrogatory.

On the other hand, in a deposition where a client is more or less naked, as it were, as a client is on the witness stand in court, the client can't get any advice from the attorney as to how to answer. And frequently, I've had people on the witness stand during trial whom I've impeached regarding things that were set forth in their interrogatories.

Additionally, there's an additional problem with the Supervisors' Answers to Interrogatories in this case. The reason I want to depose them is to get to cross-examine them to see if I can shake them loose from those answers because I have some anecdotal information that I have not been able to completely track down yet, although I've put out a call to a number of other attorneys who, I think,

might have this information. That since November 1, 1996, there has been at least and there may have been more votes to do one of the following things:

Indemnify a deputy sheriff for punitive damages or bond an award of punitive damages on appeal or payout money from the county in the case in which there was an award of punitive damages.

I believe that that – one of those three phenomena occurred in April, 2000.

That's why I've been pursuing this issue so hard because I'm concerned that the Supervisors – if I get that [12] information – they will either have gotten out of the action on Summary Judgment because I haven't been able to get it yet because I don't have the name of the case in which, I think, it happened.

Or, if the case proceeds to trial and I try to use that information to impeach them, that they're going to say that they do thousands of things all the time and they don't remember everything that they do. They take thousands of votes.

And that's basically what I want to do. I want to try to probe this a little further with the kinds of questions that you can put and do it quickly and have people be forced to answer without conferring with their attorneys.

In short, I don't think I should be stuck with their interrogatory answers. In fact, I could say to anybody in any case – and it wouldn't fly – that they shouldn't be able to depose any of our clients because they should send out interrogatories and just be satisfied with the answers because they're truthful. Yet, our clients get deposed all

the time. I've never had a case where plaintiffs weren't deposed.

That brings us to the issue that makes these people different than my clients. They're high-ranking Government officials. I know that. They don't want to be deposed, I think, because they think it would demean them. I don't think it's because they don't have enough time to be deposed or they [13] would be pestered.

I've read the Court's Order very, very carefully, and I've looked at some of the words in the cases, many of which – most of which I've read because this isn't the first time this issue has come up. And for example, on Page 5 of the court's Tentative Ruling under Roman Numeral V, in quoting from the case of *Worzon versus Drew (phonetic* [sic], the Court quotes as follows:

> "Such officials must be allowed the freedom to perform their tasks without the "constant" – and I focus on the word "constant" – interference of the discovery process."

I've never, ever deposed any Supervisors. And I only seek to depose them on this issue. There are six or seven or eight or nine cases like this pending in all of which I represent the plaintiffs. And I haven't tried to depose them in other cases. I've decided to try to put this issue to rest one way or the other in this case.

And I haven's constantly deposed them. I don't want to constantly depose them. I want to get to depose them once so that face to face and without their having assistance of counsel in answering, I'm able to pepper them with questions to see if I can shake them loose from their

blanket answer that they have never done anything like this.

So the *Worzen* case doesn't really apply. I just want [14] one shot. And then –

THE COURT: So the *Worzen* case is just gravy.

In the *Kyle Engineering Company* case, although it's just a throw-away line by the Ninth Circuit, it's still good law. I mean, I checked it every which way you can. And after more than 20 years, it's still good law.

MR. YAGMAN: I know. But there's enough – there's a word in there. The word is "normally." And –

THE COURT: And in certain circumstances, clearly, they can be deposed. And it's your burden to show that these are the circumstances to depose them.

MR. YAGMAN: Clearly understood.

THE COURT: It's a higher burden. I just didn't think you made your burden.

MR. YAGMAN: I am trying to make it a little bit better now.

I – the *Kyle* case has been around for a very, very long time. And this issue is going to keep coming up in every case. And this deposition fight is going to be fought in every case. Eventually, I'll get to depose them, somewhere, sometime.

It's better if I do it now. And let me tell you why it's better. There are four or five or six or seven or eight of

these cases pending. And I've gotten the written discovery in this case. I haven't gotten it in other cases because I [15] decided basically that that was the most efficient way to do it.

THE COURT: Are those other cases also in front of Judge Cooper?

MR. YAGMAN: No. They're in front of a wide array of judges and magistrates.

And eventually, I'll get lucky. I'll get to depose them. It's better if I do it now because if I depose them now and I get my shot, then I've sealed the time capsule from November 1st, 1996 to date. And then I don't need to try to depose them again. I don't need to ask them these interrogatories again. I can just use pickup interrogatories and say, "Since the date of your deposition or your last interrogatories, has any of this happened?" I won't need to press them again.

I want to see their demeanor. I want to know if they have personal knowledge that they didn't vote or if they're saying that they didn't vote to do this because their attorneys told them or somebody else told them they didn't vote. I want to know if they've really probed their recollections. And I want to find out if they've used some tactic to get around this. And that is maybe they haven't voted, but they've delegated authority to somebody to do this on their behalf. I don't really know how it works.

You know, I pushed this issue initially through three [16] cases with the City of Los Angeles: Two cases called *Trevino versus Gates*, one case called *Cunningham versus Gates*. And then I got the *Navarra* (phonetic) decision

against the County. So that's the quartet of cases that I've used as vehicles to plow this issue; that is, are they indemnifying? And the first three cases against the City and I've deposed all the City Counsel members at one time or another on this issue. And then I didn't depose them again because I got what I needed. There were scores of indemnifications. But apparently, they're not doing it much anymore.

The good thing about this theory is it's actually an instance in which the law has changed the facts in the world because if what they say here is true; that is, that they haven't done any indemnification since November 1st, 1996, that means these cases and their fear of liability has probably changed something, because I have sworn testimony from a case in front of Judge Wilson in the early 1990's that they always indemnify deputy sheriffs from punitive damages.

I just want to clean up this issue and end it one way or another. In all those cases, Mr. Baum's firm defended the City. And now they – in all of the cases dealing with indemnification, they've been brought in as cocounsel to defend the Supervisors. My wild guess is that in all of these cases with the Supervisors, the County's paying out several hundreds of thousands of dollars to be represented just on this issue.

[17] I'd like to put the issue to rest and get to depose them. And then if they haven't ever done it, just leave them alone. That'll be the end of it. And this is part of the showing I'm making here. They can stop hiring that firm. They can stop fighting these things. A year – ever year or

so, I'll name them as defendants to find out if anything has happened. And if it hasn't, I'll let them go.

But they're going to continue to be named in every single case because they don't want to come out of the woods and/or the weeds or wherever they are and be deposed. Take probably a half hour to depose each one of them if there aren't a lot of objections.

The Court doesn't know it, but you can ask any attorney against whom I practice, I don't think I've ever taken a deposition that lasted more than an hour and a half, ever, of a police officer or anybody.

I just want to have a shot at them so I can convince myself that what they're saying in their interrogatory answers, in fact, is true and that there isn't any doubt about it in their minds.

THE COURT: Well, can I ask you a factual question?

I'm moving on to Baca in my mind. In Baca, have you gotten any written discovery? Have you conducted any written discovery and gotten responses?

MR. YAGMAN: Yes, we have. And I don't know off the [18] top of my head what it is. I think he answered some interrogatories. I believe that he said that the materials – or the information with respect to punitive damages was the same.

I'm not as concerned with deposing Mr. Baca as I am – I'm going to concede on that issue – as I am with the

Supervisors. And one of the reasons for that is that I believe his answers to be completely trustworthy. And one of the reasons is he's a personal friend of mine. And I like him. And I think he's doing a good job. And I don't think that there's any chance in the world that his interrogatory answers wouldn't be completely truthful. I just – I wouldn't believe it. So I'm not –

THE COURT: Was there anything in his answers that led you to believe that the Supervisors were falsifying their verifications?

MR. YAGMAN: Oh, no. No, no, no, no, of course not, of course not. I'm not saying they're falsifying. I'm not making a charge like that.

I'm just saying that I've been around for a while just like everybody else here has, and I've found that there are occasions where interrogatory answers, you know, appeared on their face to be completely true and accurate. And it turned out they really weren't. That there was something missing or there was some way, because I hadn't pressed the [19] right button or used exactly the right wording, that it turned out it wasn't so.

And I've got a duty to these Plaintiffs, especially because of their statuses, to really press this issue and get to the bottom of it. And I don't want to constantly depose them. I don't normally do it. I've never done it before. I don't want to harass them. I don't have any personal animus against them, as I do with some government officials.

And the other case – another case the Court cites, the ***Union Savings Bank versus Hauppauge (phonetic)***,

which is actually where I grew up on Long Island, case says, "An official's time and the exigencies of his everyday business would be severely impeded if every plaintiff . . . " Well, every plaintiff doesn't try to do it. No one tries to do it except me. I don't think anybody's ever tried to depose them. And I don't think anybody ever has. So it isn't every plaintiff, it isn't every case. Their duties aren't going to be severely impeded. They have plenty of time. I mean, when election time comes, they're out campaigning like crazy. And it's no big whoop at all for them.

And also, in that case, it says, as the Court's quoted:

> "Such procedure would be contrary to the public interest. Plus, the fact that ordinarily, the head of a Government agency has little or no knowledge of [20] the facts."

This isn't that case. They're the people with the actual knowledge of the facts because they're the people who either did or didn't do something. I'm not asking them anything about anything that anybody else did. It's, "What did you do? Did you really not pay any punitive damages at all for the last six years?" And the answer to that is, "If you didn't, that's great, that's fantastic."

That's exactly what I've been trying to accomplish since I first got on this issue in 1989 in the ***Cornwell*** case. And the Ninth Circuit ruled that it was not contrary to public law for the State of California to permits [sic] its governmental entities to make indemnifications for punitive damages.

That's where all this started. I said it was contrary to federal law because it would gut the deterrent purpose at Section 1983." And Judge Newton – Noonan writing for the Ninth Circuit in *Cornwell versus City of Riverside* said,

"That's a really good argument, but I think plaintiffs already have enough arrows in their quiver that they can use against defendants in civil rights cases," which was a glib way for a former law professor to say, "I ain't going to do that."

THE COURT: One of my former professors, Mr. Yagman.

MR. YAGMAN: And he's very glib. And he has written 14 books. And he's a –

THE COURT: Oh, I'm not suggesting I agree with him [21] on anything.

MR. YAGMAN: And he went to the Ninth Circuit because of his position on abortion. And he's a very bright guy. And I like him.

But when he said that in that case, in *Cornwell,* I then thought to myself, "This is really, really bad. How can this be attacked." And I started attacking it in 1990 in the first *Trevino* case. And I developed the theory that, "Okay. They can do it." But the Ninth Circuit never said – and now they've affirmed it in four opinions – that there won't be any consequences for doing that.

THE COURT: I want to point out to you that my ruling's without prejudice. I'm assuming you noticed that.

MR. YAGMAN: Sure I did. And I was –

THE COURT: It meant that –

MR. YAGMAN: And it puzzled me.

THE COURT: Well, it meant that you haven't met your burden – now. But if at some point down the line

you think you've met your burden and the circumstances change, then you come back to me.

MR. YAGMAN: Well –

THE COURT: That's why I did it without prejudice. You have not met your burden at this point.

MR. YAGMAN: Here's the problem. They've made a Motion for Summary Judgment –

[22] THE COURT: Yes, I know.

MR. YAGMAN: – that's pending now in front of Judge Cooper.

THE COURT: I saw that.

MR. YAGMAN: And in order to defend against that Motion, I need to be able to depose them. I think it's unheard of for Summary Judgment to be granted in a case where the plaintiffs haven't had an opportunity to depose the defendants.

But Judge Cooper will decide that. I defended against their last Summary Judgment Motion when they said, "You had discovery in another case" –

THE COURT: I know. I read her decision.

MR. YAGMAN: By putting in a Rule 56(f) Declaration, I'm just going to have to try harder in the next few days to find at least that one case where I know they did that. And then come back again.

I think I have met our burden. And I don't think the burden is that high, as the Court believes it is. But I certainly, you know, understand what the Court is saying and –

THE COURT: I don't think it's that high. I just don't think you've shown me anything.

MR. YAGMAN: Okay.

THE COURT: Okay.

MR. YAGMAN: Maybe we should address the issue of lead discovery counsel.

[23] THE COURT: First, I want to hear from Mr. Baum to see if he has any response.

Mr. Baum? You're the winner. That usually means you have nothing to say.

MR. BAUM: I'll submit.

THE COURT: All right. Now, I'm very fond of Joe Riechmann. I've said that publicly before. And I hope to see him again in this case at some point. But it doesn't mean that you have no right to appear today. But I'll take a look at my General Order in any event, and I'll correct it.

If it's – if it gives the impression that the Court is soliciting issues to decide on an advisory basis before the real issues, then that's my fault. And I'll look at it. And I'll consider whether or not the lead discovery attorney is the person who should come and make oral argument.

And I say that only because, as you know, in other contexts in this court, for example, in Settlement Conferences, the Court generally wants the lead – or the trial lawyer to come to the Settlement Conference and not someone else in the firm.

Your firm's in a little different position in that it's a small firm. And all the lawyers in it, I'm assuming, are

equal. And we're not dealing with a huge firm where the associate can't make decisions, and it's the partner who makes the decisions. And when the associate shows up, the court is [24] in a difficult position in that they're dealing with a person who has no authority.

I assume that you and Mr. Reichmann and everyone else in your firm have authority. And I'm not dealing with it any other way.

MR. YAGMAN: Let me address those two issues.

THE COURT: Uh-huh.

MR. YAGMAN: First, the Order doesn't create any ambiguity at all, except possibly because it's raised now with respect to depositions.

But all of us, I think, understood it to be the way that it –

THE COURT: You both understood that way. So it's clearly a drafting problem, and that's my fault.

MR. YAGMAN: Well –

THE COURT: And I'll take a look at it.

MR. YAGMAN: Well, it isn't really because we – if we all understood it the same way, there's no problem.

THE COURT: Yeah.

MR. YAGMAN: But that obviates –

THE COURT: Unless that's not the way the Court wanted you to understand it –

MR. YAGMAN: Okay.

THE COURT: in which case, there's a problem. And that's what I've got to look at. Okay?

[25] MR. YAGMAN: Okay. Second, as I said, I didn't submit to the Court the correspondence that's gone back and forth, between on the one hand, Joe Reichmann, and on the other hand, Defense counsel. But I'll summarize that in a nonpejorative way by saying that they keep insisting that one, Mr. Reichmann has to handle all discovery because he's lead discovery counsel; and two, that he was selected because there's something wrong with me. That's – they basically said that. And he's written – he's written –

THE COURT: I hope they're not suggesting that.

MR. YAGMAN: I'll submit the –

THE COURT: You –

MR. YAGMAN: – correspondence.

THE COURT: Well, you travel a lot more than Mr. Reichmann, for one thing. And so –

MR. YAGMAN: Nothing –

THE COURT: – he's generally been –

MR. YAGMAN: Nothing to do with it. No, no, no.

One of the reasons we did it is so that we wouldn't get into a big squabble over the fax thing.

THE COURT: Okay. And one of my provisions in the General Discovery Order is that the District Court's rules on civility and professionalism have to be applied by

all parties. And that's including in correspondence back and forth between the parties. And I expect that to be the case.

[26] MR. YAGMAN: I'm going to submit to the Court the correspondence between Defense counsel and Mr. Reichmann so the Court can actually see what's going on.

You see, if it had been between me and them – because I'm kind of considered to be a hard guy and Joe Reichmann is considered to be a really nice guy, we have different personalities. If that correspondence had gone back and forth between me and them, everybody would say, "Oh, it's Yagman. Yeah. He's being tough."

But wait until you see this stuff between gentle Joe Reichmann and these guys where they're threatening him with stuff. That if he doesn't do what they want, they're going to relentlessly pursue him personally for sanctions.

THE COURT: If any party in correspondence violates the District Court's guidelines on civility and professionalism, I think that the other party can bring it to the Court's attention in a Motion for Sanctions.

MR. YAGMAN: You can't because the Rules say that they're unenforceable in that fashion. And I'm not saying it in the sense of wanting to get sanctions. I'm way beyond that.

I'm saying it in the sense of trying to give the Court a sense of how the Defense has used this Order and our selection of Joe Reichmann. He wasn't selected because I'm out of town a lot. He was selected because we thought that things would go more smoothly. If he did that and they would –

[27] THE COURT: And I think they have gone smoothly in this case.

MR. YAGMAN: And they have except for this correspondence where they keep telling him that he must do all discovery that – he does – that we're reading the Order incorrectly, and that I shouldn't be doing anything.

And whenever I write to them, they respond to him. They deliver things to his home, even though he's told them not to. He said, "Deliver it to the office." And this has all been documented.

I don't want to make an issue of it, and I'm not trying to make an issue of it. What I'm trying to tell the Court is that to that extent, the Order has created a problem. And some clarification on that from the Court would stop this train from going any further down the track.

THE COURT: Which particular paragraphs in the Order do you think need modification?

MR. YAGMAN: Paragraph Number 1 and I think, Paragraph Number 6. I don't have it in front of me. They define what the lead discovery attorney will do. I don't get the sense that Order was drafted for this case. I may be wrong.

THE COURT: No. It's an order I've used mainly in multi-district litigation and class action litigation. It was used in this case because at the time I got this case, this may [28] have been a Class Action. And I thought it might go on to be a Class Action. And I generally treat Class Actions a little differently than other kinds of actions.

And if this Order needs modification to make it workable in this case, then I expect the parties to call that to my attention. In fact, I believe my last paragraph in this Order specifically said that if the parties or their counsel believe this Order needs modification or amendment, they should present it to the Court. And I did put a time line on that.

But if now that this is no longer a Class Action, and it doesn't appear to be –

MR. YAGMAN: We're fine with the way the Order is. We're just reading it differently, you see. And I think it's the first sentence of the first numbered paragraph that says that the lead discovery counsel shall and shall be available at all times for whatever.

The Defense is reading that differently than we're reading it. And they're reading it to indicate that Joe Reichmann has to do all the discovery. That I can't make any decisions with respect to discovery.

And we're reading it to mean that Joe's responsibility with respect to any of this is a supervisory one. It's kind of a reviewing one that if something that another attorney in the firm does with respect to the Defense is not liked by the Defense, they can get in touch with him and [29] say, "Hey. Would you have a look at this," which is fine with me. He's older than me. He has a right to do that.

But they're reading it to limit what anybody else can do. And that's what –

THE COURT: Okay.

MR. YAGMAN: That's what the problem is.

THE COURT: Okay.

MR. YAGMAN: And I am going to submit to the Court the various correspondence between him and them to show the Court what's really been going on here.

THE COURT: I really don't need to see the correspondence, Mr. Yagman, unless it's attached in some way to some kind of motion to me that I have to rule on. I'm sorry. I don't have time, generally, to read lawyers' correspondence to and from each other.

MR. YAGMAN: And that's why we haven't yet submitted that because Mr. Reichmann said, "Don't bother the Judge with that. Don't submit it."

THE COURT: Okay. Mr. Beach, I have not heard from you at all. Would you like to say something today?

MR. BEACH: With respect to the deposition of Baca in light of the Court's Tentative and the concession, I assume that that is denied.

THE COURT: Mr. Yagman conceded he's not pushing that deposition. It's the Supervisors' deposition that he's most [30] concerned about.

MR. BEACH: Okay. With that issue having been decided, I think it is fair to say that there is a difference of opinion between counsel for the Plaintiffs and counsel for the Defendants regarding –

THE COURT: The General Order.

MR. BEACH: – the role of the lead discovery counsel in discovery. I –

THE COURT: Do you have the General Order with you?

MR. BEACH: Yes, I do, your Honor.

THE COURT: It's Number 60 on the Docket Sheet. Mr. Yagman didn't bring his copy, but he pointed to Paragraph 1.

Are there any other paragraphs that the Court should look at again?

MR. YAGMAN: It's 6 or 7. I can't remember the other one.

MR. BEACH: Paragraph 6, Paragraph 7, and Paragraph 1 which starts off the issue of the lead discovery counsel.

MR. BAUM: In which –

MR. BEACH: And –

MR. BAUM: May I go on?

MR. BEACH: Yes.

MR. BAUM: And the last sentence is causing part of the problem as well, your Honor.

[31] THE COURT: All references herein to attorney or . . . Okay.

MR. BAUM: Yeah. There's a question as to whether or not in resolving a discovery dispute, we're required to work with Mr. Reichmann or Mr. Yagman. The Order just says, "Counsel shall correspond." Paragraph 1 says, "All references to attorney or counsel generally refer

to the lead discovery attorney." It requires that all correspondence be done by facsimile. Only the lead discovery attorney is required to disclose a facsimile number. Only Mr. Reichmann has.

THE COURT: Yeah, I know. It's because Mr. Yagman's firm, as I discussed earlier on the fax, is in a different situation than most of the firms.

MR. YAGMAN: But that's not a problem –

THE COURT: And this Order –

MR. YAGMAN: – because we don't object to them faxing things to Mr. Reichmann even if they're addressed to me. So it's not a problem. And it shouldn't be a problem.

THE COURT: Let me ask you something. I did notice – because I got a courtesy copy, and it may have been from one of you, so thank you – that a Motion for Summary Judgment had been filed. The Motion for Summary Judgment wasn't filed by all the Defendants, it was filed by the Board of Supervisors, not by Defendant Baca. So I'm assuming, regardless of whatever happens on that Motion, the litigation and the discovery [32] continues. And it certainly continues regarding Defendant Baca.

Is that your reading of the situation? Because the discovery cutoff date hasn't come yet. It's like the end of March or something, isn't it, Mr. Beach?

MR. BEACH: Yes, your Honor.

THE COURT: All right.

MR. BEACH: But I –

THE COURT: So –

MR. BEACH: I'm sorry.

THE COURT: Well, I was just trying to figure out the urgency in terms of correcting the General Order in light of ongoing discovery.

So there is ongoing discovery between Defendant Baca and the Plaintiffs, right?

MR. BEACH: Yes, your Honor. And I think it's fair to say – and Mr. Yagman can correct me if I am wrong – but I think it's fair to say that from the Defendants' standpoint, they view the issue as – with regard to discovery issues and discovery disputes and the working amount and the resolution of them, that the lead discovery counsel are supposed to be – that's our chore. My –

THE COURT: Well, I think it was set up that way –

MR. BEACH: My –

THE COURT: – because in multi-district litigation, [33] where you have 180 cases and you have 180 plaintiff's lawyers, you can't deal with 180 lawyers on one side and two lawyers on the other side equally.

MR. BEACH: And –

THE COURT: And that's why it was. And also, in Class Actions, it was set up the same way.

MR. BEACH: And my understanding – based on my conversations with Mr. Reichmann and the correspondence from Mr. Yagman, my understanding of Plaintiffs'

position is that if there's a dispute, first, we go try to resolve the issue with Mr. Yagman. And if we don't resolve it with Mr. Yagman, then we go resolve it with Mr. Reichmann.

And the problem with that is, besides the delay, it doubles the amount of effort we have to put in to try to resolve the issue. And unfortunately – well, actually, I think fortunately, I think we're able to resolve more issues with Mr. Reichmann on a faster basis.

And that's – when I got – when we sat here – when the Court issued the General Discovery Order and called us in here, we had a very long hearing. And I have picture memories of that hearing. And to me, the Court was – tried to impress upon me the very important and clear role that lead discovery counsel was going to take, et cetera, et cetera, et cetera, et cetera. And that's what we've been trying to proceed on –

THE COURT: Yes.

[34] MR. BEACH: – based on that spirit.

THE COURT: Usually, it's not different lawyers with the same firm.

MR. YAGMAN: The Court –

THE COURT: That's what I'm trying to explain.

MR. YAGMAN: The Court may not recall how this came about. I requested this so that the Plaintiffs wouldn't be burdened by dealing with more than one Defense attorney. And I suggested to the Court in a written submission that in the *Rampart* litigation that

Judge Feess had done the same thing. This wasn't requested by anybody but me.

And there isn't one lead Defense discovery –

THE COURT: Well, I –

MR. YAGMAN: – counsel.

THE COURT: – actually don't recall that. But in –

MR. YAGMAN: It's in the file.

THE COURT: – in usual circumstances, the problem is with lawyers from different firms. The problem is not with lawyers within the same firm and in figuring out how to expedite discovery that way.

I'll go back and I'll take a look at the General Order. The sole purpose of the Order was for the discovery process to move more smoothly. That's the sole purpose of it.

And for – because the judges set short time frames for discovery and if it's not moving smoothly, then people go [35] back to the judge to expand discovery and the whole case goes on and on and on, and it winds up costing more and more money and time for everybody.

So let me take a look at it. And my intention was for there to be a discovery attorney; for that discovery attorney to be available as much as possible so that there wouldn't be delays of time while the discovery attorney was in others [sic] parts of the country working on other litigation. And –

MR. YAGMAN: That is just so far from what I understood because that's not an issue in this case. I'm not in other parts of the country working on litigation. The

fact that I happen to live in New York means that I go there whenever I can. But I'm, you know, I'm available like that.

And you know, if a problem arises from this, we're just going to staunch [sic] the problem by making me lead discovery attorney. And that will be that. And they won't have a fax number. And then everybody can fight over that.

THE COURT: Hold on. They have Mr. Reichmann's fax number.

MR. YAGMAN: He – if he isn't lead discovery attorney, they're not going to be sending faxes to his home.

THE COURT: Well, we'll deal with that issue. I mean, I have to tell you, Mr. Yagman, that the Local Rules require that the lawyers provide their fax number on –

[36] MR. YAGMAN: If they have one.

THE COURT: Well.

MR. YAGMAN: If they can't and they don't, you know, and I'll fight this issue out in this court if I have to.

THE COURT: Well, at some point, you may have to.

MR. YAGMAN: They – Court – the Court can't require anybody to have a fax machine or have a line dedicated to a fax.

THE COURT: I –

MR. YAGMAN: If someone wants to litigate that, it'll go as high as it goes.

And one of the reasons – you know, we're civil rights lawyers. We're not a big firm like Mr. Baum's firm where there are unlimited resources. We make sure that everything we do is cost-effective because we pay for it. Our clients don't pay for anything. I know –

THE COURT: Well, I understand.

MR. YAGMAN: – the Court knows that.

THE COURT: But no one can say the fax is not cost-effective in that you get timelier things from the courts.

MR. YAGMAN: We get to decide –

THE COURT: You get timelier things –.

MR. YAGMAN: – if we dedicate a line to a fax machine, and not – nobody –

THE COURT: And –

[37] MR. YAGMAN: And it's there for our convenience, not for the court's, not for anybody else's convenience.

THE COURT: Well –

MR. YAGMAN: They have their resources. You know, when they want to send a messenger, they send one. When they don't, they send it by snail mail. I mean, there are a lot of games that go on in this.

THE COURT: No. Mr. –

MR. YAGMAN: We don't have a fax. We're not going to have one.

THE COURT: All right. I won't say anything.

MR. YAGMAN: I am –

THE COURT: You just talk right over me, Mr. Yagman.

I was going to point out to you in that –

MR. YAGMAN: I apologize.

THE COURT: – the recent emergency with the Postal Service in Washington, for example, has meant that this Court gets correspondence from Washington, not through the mail, but now by fax or e-mail.

I'm suggesting to you that it's not unforeseeable that at some point down the line, whether it's due to a national emergency or some other reason, that lawyers who litigate in the court may have to have faxes and may have to be able to get things by fax or e-mail from the Court.

I just want you to open your mind to that possibility [38] in light of 21st century developments.

MR. YAGMAN: It's presently voluntary. And –

THE COURT: That may be.

MR. YAGMAN: It is.

THE COURT: That may be. But I'm saying it may not be down the line.

MR. YAGMAN: And let me tell –

THE COURT: And I don't make policy for the Court.

MR. YAGMAN: Let me tell the Court one other thing also –

THE COURT: Uh-huh.

MR. YAGMAN: – so the Court doesn't get the wrong impression.

If a law firm receives things by fax, you also need to have someone always monitor the fax machine to make sure that something hasn't come. And I know for a fact, and I think the Court knows, that very frequently civil litigation is very uncivil whereas criminal litigation often is very civil.

And firms in Los Angeles, especially big litigation firms – and I'm not referring to Mr. Baum's firm – use the fax machine to harass people. And they use it as a bludgeon, and they send 50-page documents at 5 'till 5:00 on a Friday. And things like that. If we were to dedicate a line to the fax, we would also have to have a person regularly, every half hour, go and check the fax machine. We simply don't have those [39] resources. We just don't. And if we did, we might look at it differently.

But again, everything that we do in the several hundred cases we have, we pay for out of our own pockets. It's not funded by a client. And we have to watch what we do, like postage and faxes and personnel really, really carefully because there are times when cases come in and we get our contingency fee. And there are times when months and months and months go by and we don't make any money. I'm not whining about that. I'm simply pointing it out as a fact of life.

All law firms are not on an equal footing. And especially civil people who represent plaintiffs in civil rights cases, just don't have the resources when they always go

up against the Government to do it in the way that O'Melvany and Meyers does it. That's just a fact of life.

And as a result of what's come up with all this, I am hereby designating myself as lead discovery counsel in this case to put an end to all of this. We don't have a fax machine. Defense counsel are no longer authorized to fax things to Joe Reichmann's home because –

THE COURT: Let me point –

MR. YAGMAN: – that's where he lives.

THE COURT: Okay. But let me point something out to you. And I was trying to do this when I asked Mr. Beach whether the ongoing discovery is going to be with him. And so [40] it just seems to me, you're applying a standard that might be appropriate to Mr. Baum if he's the one who's been harassing, or he's the one who's been using pejorative terms in correspondence to Mr. Beach.

And it seemed to me, and I mean this, from my discussions with Mr. Beach and Mr. Reichmann, when they were meeting in my jury room initially and trying to figure out initial parameters, including getting information about the Plaintiffs in the most efficient and effective way for us to discover where these guys were and what their full names were and all these other things, which is essential for your case as well as their case, that Mr. Beach and Mr. Reichmann had worked out a cooperative working relationship.

And I want you to think and not act against Mr. Beach based upon your feelings towards Mr. Baum. And that's all I'm suggesting, Mr. Yagman.

MR. YAGMAN: The feelings with respect to both Defense counsel – and I'm not going to burden the Court with the correspondence because it includes Mr. Beach also.

THE COURT: Okay.

MR. YAGMAN: So I'm the lead discovery attorney; there is no fax number. And if somebody objects to that or thinks that this Court or anybody can require an attorney to dedicate a line to a fax, then they can raise that issue. And we'll fight it out with them.

[41] MR. BEACH: I have four points that I just want to raise, and they don't necessarily require a response.

The first is that the Court should know, and I'm sure you don't want proof of this. But I will represent to the Court that I receive faxes from Mr. Yagman's office virtually every day, at all hours of the day and night, whenever it suits them. So I think it's unfair for them to say, "We can't – we don't have to give you a fax number."

THE COURT: I –

MR. BEACH: But yet we can both –

THE COURT: I agree with you. I've made my views on the fax known.

And it may be –

MR. BEACH: That –

THE COURT: – that the Court Executive Committee, in determining the fact that it's put the fax number on the pleading pages, et cetera, may have to bite

the bullet and make a policy decision as to whether lawyers who litigate in this court have to have a fax.

And I'm not on that committee and probably will never be on that committee as long as I live. But it may be that it's appropriate to bring it up to that committee. And I'll think about that, Mr. Beach.

MR. BEACH: And in all, my point would simply be is, you know, if you're going to accept the benefits of a fax, then [42] you accept the burdens. That's my point.

The second issue that I have is that this Court's General Discovery Order provides that the role of lead discovery counsel cannot be switched. Once you've elect – made that election –

THE COURT: I'll have to look at that.

MR. BEACH: I will – you can – please do.

Third, if the Court is going to look at the General Discovery Order again, might I humbly suggest that you also look at the transcript where we sat down and discussed it because I think that would help put everything into context.

MR. YAGMAN: I'll add one thing to that. What I said, I said with the authority of Mr. Reichmann. He said that if this came up the way it came up, he doesn't want to be lead discovery counsel anymore because he's found it's become to [sic] burdensome for him. And if the Court needs to hear him say that, he'll be back from San Francisco this evening. We can reconvene again here tomorrow or Friday, and he'll tell the Court that. He doesn't want to have to deal with these guys anymore.

And he is annoyed that I participated in his selection as lead discovery counsel. So this isn't just me saying this, this is him also. And if you want to hear him say it, he's happy to come into court and say it on the record. So just tell us when, and he'll be here.

[43] THE COURT: Well, apparently, I was living in a fool's paradise when I thought that you, Mr. Beach, and Mr. Reichmann were getting along well together doing discovery in this case. And I must have just been in another world.

MR. BEACH: Well, my fourth point was, was just because there's been lots of accusations and statements and I haven't stood up and responded to them, I don't think that the Court should accept that as true.

I will tell you that I have worked with Mr. Reichmann. I've spoken with him on many occasions. He seems to be a very agreeable person. And we have – we have not resolved every issue, but we have resolved many issues. I think there are lots of issues in this case, and we have avoided discovery disputes by working them out. And I – it would be my hope that he continue to remain as discovery counsel for the benefit of everyone involved.

But you know, whatever this Court is – you know, permits the Plaintiffs to do is, you know, obviously beyond my control. But we have resolved many issues. We have not resolved all of the issues.

And when I first met your Honor and Mr. Reichmann, I believe your remark to me was something to the effect of, "Joe, I'm very glad you're here, and Mr. Beach, you will be, too." And I agree with you. Have – now, several months later, I concur in your observation.

[44] THE COURT: I'm very fond of Joe. I never see him, but I'm very fond of him. And I'm always happy to see him.

And I obviously had the false impression that – apart from this issue, which is a significant issue and an issue that really doesn't have anything to do with cooperation or amicability of the parties, but is a – is a legal question to be decided by the Court, that discovery was running smoothly. And I guess I completely misunderstood what was happening and I'm sorry.

MR. YAGMAN: Your Honor, it hasn't run smoothly. But we have refrained from making other motions because deadlines set for the Defense – we were supposed to do some things by November 29th. I rushed and got them all done by the 27th. And then that triggered the Defense doing other things and none of their responses to anything were timely. It's delayed the litigation.

We haven't complained to the Court about that because Joe Reichmann said, "Let it alone. Don't bother the Judge with it." I wanted to come into court with it a few times, and he held me back. And I said, "Fine. I'll take your advice. You're older than me. You've been around longer than me."

THE COURT: You keep saying he's older than you, but I – is that true?

MR. YAGMAN: Yeah. I'm 58, and he's 71.

THE COURT: I'm just teasing you, Mr. Yagman.

[45] MR. YAGMAN: Okay.

THE COURT: Okay.

MR. YAGMAN: Thank you.

THE COURT: Well, I feel older than Mr. Reichmann today. So give him my regards when you see him.

I think my task for today is reexamining my General Discovery Order. I have not heard anything today in oral argument that I didn't consider – actually didn't consider when I drafted the Tentative. I thought about all those things. And I've explained to you why I did it without prejudice.

MR. YAGMAN: Sure. Sure.

THE COURT: And –

MR. YAGMAN: I've got –

THE COURT: – the Tentative will go out as it exists.

MR. YAGMAN: Yeah. I've got a deposition –

MR. BEACH: Thank you.

MR. YAGMAN: – across the street at 10:00 o'clock.

THE COURT: Okay.

MR. YAGMAN: So I'm not –

THE COURT: You're excused.

MR. YAGMAN: – going to wear this out.

Thank you.

THE COURT: Everybody's excused.

[46] MR. BEACH: Thank you, your Honor.

MR. BAUM: Thank you, your Honor.

(This proceeding was adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Pattie Walker — FEB 05 2002
Transcriber — Date

TRANSCRIPT AUTHENTICATED BY:

TONI HUDSON

FEDERALLY-CERTIFIED TRANSCRIBER

/s/ Toni Hudson — FEB 05 2002

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-236

In The

Supreme Court of the United States

YVONNE BURKE, *et al.*,

Petitioners,

vs.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RELEVANT PROCEDURAL HISTORY

On July 18, 2002, counsel of record for Petitioners executed a "Stipulation and Order for Dismissal with Prejudice of the Supervisor Defendants," a copy of which is set forth at App. 1. Respondent's counsel executed that Stipulation on July 10, 2002, the district court ordered dismissal with prejudice pursuant to the Stipulation on August 19, 2002, and the order was filed on August 20, 2002 and entered on August 21, 2002. *Ibid.* Therefore, this action is moot.

Apparently, Petitioners' counsel failed and has continued to fail to advise this Court of this important procedural fact.

INTRODUCTION

Standing is a threshold jurisdictional or quasi-jurisdictional doctrine that bars the doors of the federal courthouse, and the same article III imperatives that underlie the standing doctrines continue throughout the course of federal litigation under the rubric of the companion doctrine of "mootness," which may be thought of as standing redux. Mootness stops an action in its tracks either "when the issues presented no longer 'live' or the *parties lack a legally cognizable interest in the outcome.*" *Powell v. McCormack*, 395 U.S. 486, 489 (1969) (emphasis added). Here, Petitioners lack a legally cognizable interest in the outcome because they participated in a voluntary dismissal. The requirement that issues be raised in a sharp adversary context between *parties* with concrete stakes persists at each federal appellate level, here bars Petitioners seeking certiorari because they no longer are

parties to this action: there is no case or controversy as to Petitioners.

When a case becomes moot while it is on appeal, the ordinary appellate court response is vacatur of the judgment below. The principal reason for this is that the judgment loser should not suffer the adverse *res judicata* or collateral estoppel effects of that judgment, but only when, for reasons *beyond its control*, there is a denial of appellate review. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) (referring to mooting that occurred "through happenstance"); *Associated Gen. Contractors of Conn., Inc. v. New Haven, Conn.*, 41 F.3d 62 (2d Cir. 1994). Here, the mootness is the result of Petitioners' voluntary entry into a stipulation for voluntary dismissal, and thus, not even vacatur would be appropriate.

Indeed, as here, when the parties render a case moot by settling their controversy, there are no equitable considerations that would favor a vacatur of the judgment sought to be reviewed, or even a vacatur to undo *res judicata* or collateral estoppel effects is not appropriate. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).

REASON FOR DENYING THE PETITION: MOOTNESS

There is no case or controversy, Petitioners, who agreed voluntarily to the dismissal of the action as against them are without standing to proceed, and therefore, the matter is moot.

For over 100 years, this Court has recognized that mootness bars its consideration of questions presented to it.

In *Mills v. Green*, 159 U.S. 651, 653 (1895), a motion was made to dismiss the appeal based on the ground that "there is now no actual controversy involving real and substantial rights between the parties to the record, and no subjectmatter [*sic*] upon which the judgment of this court can operate." (Internal quotation marks deleted.) Such is the case here, because there is no actual controversy involving real and substantial rights between the parties to the record, and hence no subject matter on which this Court can operate.

In *Mills*, this Court explained that

> the appeal must be dismissed upon this ground [of mootness], without considering any other question appearing on the record or discussed by counsel[,] [because t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when . . . an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.

Ibid. (citation omitted).

This Court "may not, without disregarding [its] duty, pass upon [questions presented] because of their absolute want of present actuality; that is, because of their now moot character." *United States of America v. Hamburg-Amerikanische Packetfahrtactien Gesellshaft*, 239 U.S. 466, 475 (1916).

In *Hamburg-Amerikanische*, this Court explained that it would refuse to decide a question "merely upon a prophecy as to future conditions invok[ing] the exercise of judicial power not to decide an existing controversy, . . . to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California v. San Pablo t.r. c/o*, 149 U.S. 308, 314, 37 L.ed. 747, 748, 13 Sup. Ct. Rep. 876[.]" *Ibid.* Here, Petitioners specifically attempt to invoke this Court's jurisdiction based not on an existing controversy, but instead on nothing more than a precatory attempt to "control[] predicted future conduct." Pet. at 6-7 & n. 1 (setting forth parade of horribles that may occur in future, and expressly seeking to "control[] predicted future conduct," as a basis for this Court to grant certiorari in and decide a moot matter).

In *San Pablo*, this Court held that "[t]he duty of this court . . . is limited to determining rights of persons . . . which are *actually controverted in the particular case before it*." *Loc. cit.* (emphasis added). Here, there are *no rights of persons which are actually controverted in this particular case*. Thus, this Court has a duty to deny the Petition.

Moreover, because this Court "is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or

rules of law which cannot affect the result as to the thing in issue in the case before it[,] [not even a] stipulation of the parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard." *Hamburg-Amerikanische*, 239 U.S. at 475-76. Here, Petitioners ask this Court to do that which the Court clearly has said it is without power to do, to wit, decide a moot question and "to declare for government [officials] of future cases principles or rules of law which cannot affect the result as to the thing in issue in the case before it." Here, as in *Hamburg-Amerikanische*, "there are no issues on the merits before [this Court] which [it] ha[s] a right to decide[,]" 239 U.S. at 477, because of the "general rule as to the absence of authority to consider a mere moot question," *ibid.*, and because of "the fact that the want of actuality ha[s] arisen . . . from the consent of the parties or the action of a defendant [here Petitioners]. . . . " *Ibid.* Petitioners themselves stanched and prevented "actuality" by seeking voluntary dismissal.

It is "[t]he established practice of the Court in dealing with a civil case from a court in the federal system *which has become moot while on its way here* . . . to reverse or vacate the judgment below and remand with a direction to dismiss[,]" *Munsingwear, Inc.*, 340 U.S. at 39, and "[t]his has become the standard disposition in federal civil cases. . . . " *Id.* at 39 n. 2 (collecting cases). Indeed, such is more so the case when a party "acquiesced in the dismissal," *id.* at 40, as here. As in *Munsingwear*, "[t]he case is therefore one where the [Petitioner], having slept on its rights, now asks [this Court] to do what by orderly procedure [they] could have done for [them]sel[ves]." *Id.* at 41. Petitioners participated in the voluntary dismissal of the

case below: if they wished to preserve the issues presented to this Court, they should not have done that.

Moreover, it has been suggested that this Court's duty of scrutiny in considering mootness *vel non* is lower when the Court has not granted certiorari, as opposed to when mootness has been asserted after the Court has granted review. *Mintzes v. Buchanon*, 471 U.S. 154, 105 S.Ct. 2006, 2007 (1985) (Burger, C.J., dissenting from memorandum) ("In my view, the Court has a higher duty when it learns that a case has become moot after it has granted review than when it discovers that a case in which review is being sought has become moot.") (Emphasis omitted.)

Should Petitioners rely in reply on either *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), or *Northeastern Florida Chapt. of the Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 661-62 (1993) (citing *City of Mesquite* for proposition set forth below), for a contention that the matter is not moot, the anticipatory response to such a contention is that both cases dealt with alleged mootness based on "a defendant's voluntary cessation of a challenged practice [which] does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S. at 289. Here, of course, there is no claim there was a voluntary cessation of any challenged practice, and therefore, *City of Mesquite* is inapposite.

Since "Courts of Appeal dismiss cases that have become moot between the time of the ruling below and the issuance of an appellate decision because of the requirement that article III courts decide only 'cases or controversies,'" *Armster v. United States Dist. Court for the Central*

Dist. of California, 806 F.2d 1347, 1354 (9th Cir. 1987), *as amended*, and because federal courts "do not have the constitutional authority to decide moot cases," *id.* at 1355, in this case the Petition for Certiorari should be denied because there presently is no case or controversy and hence no article III jurisdiction.

It follows from the foregoing principles that since no Petitioner in this case may be granted either absolute immunity or qualified immunity in *this* case, because all Petitioners consented to voluntary dismissal of *this* case as against them, and because this case therefore is not now pending against any of them, that there is no case or controversy. Petitioners are without standing to seek relief, and questions presented are moot. (That Petitioners seek prospective relief for themselves or others in other cases, as they admit, Pet. at 6-7 & n. 1, is no reason to grant the Petition, and is reason to deny it.)

CONCLUSION

Hardly is there any basis for this Court to grant certiorari based on an unpublished, summary affirmation, Pet. App. at 1, of an unpublished district court order denying a motion to dismiss, *id.* at App. 2-18, sought by persons who, by their own, voluntary act, no longer are parties to the underlying action, and who twice before sought, and were denied, certiorari of the same two questions by this Court: *Trevino v. Gates*, 23 F.3d 1480 (9th Cir.), *as amended, cert. denied sub nom. Wachs v. Trevino*, 512 U.S. 1281 (1994) (absolute immunity for voting to indemnify for punitive damages, question 1 herein); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996), *cert. denied*,

117 S.Ct. 1249 (1997) (qualified immunity for voting to indemnify for punitive damages). Oddly, in none of Petitioners' citations to these two cases throughout the Petition does their counsel of record, Louis R. Miller, III, provide a complete citation to either case, including an indication of the denial of certiorari, or that certiorari was sought in those cases by the same Petitioners' counsel of record herein, Mr. Miller. Nor is it mentioned in the Petition that in *Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001), another case raising the same questions as those raised herein, cited at pages 6, 9, 15, and 18 of the Petition, certiorari could have been sought by Mr. Miller, who represented the same Petitioners herein, but the case was settled.

That instant attempted end run around the law should not be permitted because it went out of bounds when Mr. Miller entered into a voluntary dismissal of the action as against Petitioners on July 18, 2002.

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Western Division

JAVIER ROCHA, Plaintiff, v. LEE BACA; YVONNE BURKE; DONALD KNABE; GLORIA MOLINA; ZEV YAROSLAVSKY; PETE SCHABARUM; DEANE DANA; MICHAEL ANTONOVICH; DAVID SAMEYAH; TWENTY UNKNOWN NAMED DEFENDANTS; all sued in their individual and official capacities; and COUNTY OF LOS ANGELES, sued only in its official capacity, Defendants.	Case No. 00-4989 AHM (BQRx) **STIPULATION AND ORDER FOR DISMISSAL WITH PREJUDICE OF THE SUPERVISOR DEFENDANTS** [F.R.C.P. 41(a)(1)] (Filed Aug. 20, 2002)

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, Plaintiff Javier Rocha ("Plaintiff") and Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich (the "Supervisor Defendants") by and through their respective counsel, hereby stipulate to the dismissal with prejudice of the above-captioned action as to the Supervisor Defendants, with each party bearing their own costs.

Dated: July 18, 2002

CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP

By: /s/ Andrew I. Baum
ANDREW I. BAUM
Attorneys for Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky, and Michael Antonovich

Dated: July 10, 2002

YAGMAN & YAGMAN & REICHMANN & BLOOMFIELD

By: /s/ Stephen Yagman
STEPHEN YAGMAN
Attorney for Plaintiff Javier Rocha

IT IS SO ORDERED.

Dated: August 19, 2002

/s/ A. Howard Matz
The Honorable A. Howard Matz
United States District Court Judge

(4)

Supreme Court, U.S.
FILED
SEP 27 2002
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No. 02-236

In The

Supreme Court of the United States

YVONNE BURKE, DONALD KNABE, GLORIA MOLINA, ZEV YAROSLAVSKY, and MICHAEL ANTONOVICH,

Petitioners,

v.

JAVIER ROCHA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioners Yvonne Burke, Donald Knabe, Gloria Molina, Zev Yaroslavsky and Michael Antonovich hereby submit this reply brief in support of their petition for *writ of certiorari* to address new points raised in Respondent Javier Rocha's opposition brief.

Respondent argues in his opposition that his voluntary dismissal of this action in the district court below three days after the petition for *writ of certiorari* was filed renders the petition moot. Petitioners already submitted a Supplemental Brief citing to on-point authority which holds otherwise. They will not repeat those arguments here. Respondent's opposition brief, however, demonstrates that Respondent dismissed this case below to manipulate this Court's *certiorari* jurisdiction.

Respondent's counsel states that he executed the stipulation for dismissal on July 10, 2002. This is impossible. The stipulation was not provided to him until eight days later, on July 18, 2002, when Respondent's counsel offered to dismiss the case. On that date, Respondent's counsel was provided with a stipulation of dismissal but did nothing until after the *certiorari* deadline had passed. He filed the dismissal on August 16, 2002, *after* he was served with the petition.

Respondent's counsel made a tactical decision to delay filing his dismissal. He waited to see if Petitioners would rely on his promise to dismiss the case and, in the process, forego seeking review by this Court. Once the petition was filed, however, counsel immediately dismissed the action

and now argues that the dismissal gives this Court no choice but to deny the petition as moot. This tactical manipulation should not be permitted to affect the substantive issues here.

Petitioners cited two cases in their Supplemental Brief which deal with precisely this type of conduct: *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 659, 113 S.Ct. 2297 (1993) and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1982). In both cases, this Court refused to consider a matter moot after one of the parties voluntarily terminated the underlying conduct at issue. That is precisely what happened here.

Respondent's cited authorities regarding mootness do not apply here. In *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284, 120 S.Ct. 1382 (2000), the owner of a nude dancing establishment challenged a local ordinance banning nudity. The Pennsylvania Supreme Court struck down the ordinance, and the City filed a petition for *writ of certiorari*. *Id.* at 286. Immediately thereafter, the owner moved to dismiss the petition on the ground that he no longer operated a nude club and that the case was moot. *Id.* at 287.

This Court denied the motion, recognizing that the owner was free to resume his operations in the future and that he improperly sought to moot the action in order to prevent his favorable ruling from possibly being overruled by this Court: "Our interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." *Id.* at 288.

Respondent's reliance on *U.S. v. Hamburg-Amerikanische Packetfahrtactien Gesellshaft*, 239 U.S. 466, 475, 36 S.Ct. 212 (1916), is equally misplaced. That case refused to consider "prophe[tic] future conditions" as sufficient to avoid dismissal on mootness grounds. The future harm here, however, is not prophetic; it is *guaranteed*.

Petitioners will be moving for summary judgment in one of the cases filed against them, *Benas v. Baca*, 00-CV-11507, in the next few weeks. The Ninth Circuit law discussed in the petition for *writ of certiorari* denies Petitioners absolute immunity and subjects them to burdensome discovery before qualified immunity may be adjudicated. These authorities are binding on the district court which will consider Petitioners' summary judgment motion.

Respondent's claim of mere prophecy is also undercut by his counsel's own words. Counsel promised to keep suing Petitioners and has lived up to that promise; at least three identical cases have been filed against Petitioners but not yet served. Respondent's attempt to manipulate this Court's jurisdiction and to deny the Court the ability to correct the Ninth Circuit's immunity decisions should not be permitted.

CONCLUSION

For the foregoing reasons, Petitioners assert that the issues raised in their petition for *writ of certiorari* are not rendered moot by way of Respondent's dismissal of this action in the district court below and request that this Court grant their petition to prevent the erosion of absolute and qualified immunity afforded to elected legislators.

Respectfully submitted,

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